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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1747

PENTHOUSE INTERNATIONAL, LTD.
Petitioner,

v.

HINSON McAULIFFE, Individually and as
Solicitor General of the County of Fulton,
State of Georgia, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Penthouse International, Ltd., respectfully prays that a Writ of Certiorari issue to review that portion of the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 6, 1980, which reverses a portion of the judgment of the District Court entered below[1].

OPINION BELOW

The opinion of the Court of Appeals, reported at 610 F.2d 1353 (5th Cir. 1980) appears in Appendix D hereto.

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[1] The Fifth Circuit affirmed in part and reversed in part two decisions of the District Court. As indicated, this petition is directed to the portion of the Fifth Circuit judgment reversing the District Court. Respondent Hinson McAuliffe has stated his intent to petition for certiorari as to those portions of the Fifth Circuit decision affirming the rulings of the District Court.

The Court of Appeals consolidated two series of cases on appeal from separate decisions by the District Court for the Northern District of Georgia, Atlanta Division. The District Court opinions are reported at 436 F. Supp. 1241 (N.D. Ga. 1977) and 454 F. Supp. 289 (N.D. Ga. 1978); these opinions appear as Appendices B and C respectively.

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on February 6, 1980, and this Petition for Certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly reversed the District Court in holding that the January, 1978 issue of *Penthouse* magazine, taken as a whole, was obscene and not protected by the First Amendment.

2. Whether the Court of Appeals properly reversed the District Court on the basis of a *de novo* review of parts one and two of the three part test for obscenity in *Miller v. California*, 413 U.S. 15, 24 (1973) and properly found that *Penthouse* appealed to the prurient interest and was patently offensive.

STATUTORY PROVISIONS INVOLVED

The First Amendment and the first Section of the Fourteenth Amendment to the Constitution of the United States, set out in their entirety in Appendix A hereto.

The Georgia obscenity statute, Ga. Code Ann. §26-2101, Georgia Laws, 1975 Session, p. 498, set out in its entirety in Appendix A hereto.

STATEMENT OF THE CASE

A. *Procedural Background*

Respondent Hinson McAuliffe (hereinafter McAuliffe) is the Solicitor General of Fulton County, which includes most of Atlanta, Georgia. He has authority to commence criminal proceedings by accusation, and to prosecute violations of the Georgia obscenity statute, Ga. Code Ann. §26-2101. In July, 1977, Respondent McAuliffe began a series of warrantless arrests of retail booksellers in Atlanta, all of whom were charged with violations of Ga. Code Ann. §26-2101. This series of arrests occurred during the period July 18 to July 29, 1977. The persons arrested were generally clerks in drugstores, convenience food stores, and newsstands. They were arrested for selling *Penthouse*, and a number of other magazines. On July 28, 1977 Petitioner Penthouse commenced an action in the District Court for the Northern District of Georgia alleging, *inter alia*, that Respondent McAuliffe had embarked on an intentional course of bad faith conduct including numerous warrantless arrests, intimidating statements, and intentional public misinterpretations of the Georgia obscenity statute. The complaint alleged that Respondent McAuliffe had publicly and privately asserted that the Georgia obscenity statute authorized arrests for the sale of a publication if any segment of that publication were obscene under Georgia law, rather than if the publication, taken as a whole, were obscene. Federal jurisdiction was based on 28 U.S.C. §§1331 and 1343(3). Four other magazine publishers filed similar complaints within a few days.

On August 15 and 16, 1977, the Court conducted a consolidated evidentiary hearing on all of the publishers' complaints. Following this non-jury trial the District Court entered its Order of August 25, 1977 in which the Court "PERMANENTLY ENJOINED [Defendant McAuliffe] from making further arrests under Ga. Code §26-2101 for the sale of the August issues of plaintiffs' publications without first obtaining arrest warrants" (App. B-35). In addition the Court declared "that defendant McAuliffe's enforcement activities under color of Ga. Code §26-2101, consisting of numerous and harassing arrests with or without a warrant prior to a final adjudication upon the issue of obscenity *vel non* at an adversary hearing constitutes a prior restraint violative of the First and Fourteenth Amendments to the United States Constitution" (App. B-34, 35). The Court also declared "that the August, 1977 issue of "Penthouse" magazine is not obscene within the meaning of *Miller v. California*, *supra*, and Ga. Code §26-2101"[2] (App. B-38). This decision is hereinafter referred to as *Penthouse I*.

On August 25, 1977, the day after the District Court's ruling in *Penthouse I*, Respondent McAuliffe informed the attorney for the regional distributor of *Penthouse*, that Respondent McAuliffe considered the September issue of *Penthouse* obscene (*Penthouse II*, Tr. I, 27-28).[3] In an informal proceeding before a judge of the State Court of Fulton County (Atlanta), Georgia, Respondent McAuliffe was told by the state court judge that the judge did not consider the September issue of *Penthouse* to be obscene. Respondent McAuliffe was also told by the state court judge that *Penthouse* magazine must be considered as a whole, rather than in isolated excerpts, in determining obscenity *vel non* (*Penthouse II*, Tr. I, 29-32). On about December 2, 1977, the attorney for the local distributor of *Penthouse* learned that Respondent McAuliffe had arrested a local retail bookstore operator and charged him with violations of Ga. Code Ann. §26-2101 for the sale of the December issues of *Penthouse*, *Playboy* and *Oui* (*Penthouse II*, Tr. I, 39). On about December 6, 1977 Respondent McAuliffe issued accusations initiating prosecutions against Robert Guccione and Penthouse International Ltd., publishers of *Penthouse* magazine, charging them with violating Ga. Code Ann. §26-2101 as a result of the local retailer's sale of the December issue of *Penthouse* in Fulton County (Pl. Exs. 6, 9; *Penthouse II*, Tr. I, 103). Similar accusations and proceedings were commenced against Hugh Hefner and Playboy Enterprises, Inc., publishers of *Playboy*, and Daniel Filipacchi and Playboy Publications, Inc., publishers of *Oui* (*Penthouse II*, Tr. I, 41). Between December 6, 1977 and December 8, 1977 Respondent McAuliffe announced he had purchased the January 1978 *Penthouse*, and that he considered that issue obscene (*Penthouse II*, Tr. I, 42).

On December 9, 1977 Petitioner commenced the second case in the District Court for the Northern District of Georgia. The Penthouse complaint alleged that Respondent McAuliffe had continued bad faith prosecutorial efforts to thwart the distribution of *Penthouse* magazine, and that as a result of his unconstitutional enforcement procedures, the distribution of *Penthouse* had been completely terminated in metropolitan Atlanta. Federal jurisdiction was again premised on 28 U.S.C. §§1331 and 1343(3). The Penthouse complaint sought declaratory and injunctive relief against Respondent McAuliffe's enforcement procedures. The complaint also sought a declaration that the December, 1977 issue of *Penthouse* was not obscene. By amendment, Penthouse sought a declaration that subsequent issues published prior to the trial were not obscene. Similar complaints were filed within a few days by the publishers of *Playboy* and *Oui*. The District Court conducted a three day non-jury trial in May, 1978 and entered its Order and Opinion on July 7, 1978. In this Order, the District Court declared "that Mr. McAuliffe must apply the Georgia obscenity statute, Ga. Code §26-2101 so as to consider magazines and other printed material 'as a whole' " (App. C-36). The Court further declared "that the January, 1978 issues of 'Playboy', 'Penthouse' and 'Oui' are not obscene within the meaning of *Miller v. California, supra*, and Ga. Code §26-2101" (App. C-36). This opinion is hereinafter referred to as *Penthouse II*.

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[2] In *Miller v. California*, 413 U.S. 15 at 24, this Court stated the test for obscenity as follows: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. [Citations omitted]

[3] References to the record will include an indication of whether the cite relates to the record in *Penthouse I* or *Penthouse II*.

Respondent McAuliffe appealed the District Court's judgments in both *Penthouse I* and *Penthouse II* to the Court of Appeals for the Fifth Circuit. The Fifth Circuit consolidated the cases on appeal. Oral argument was held on August 27, 1979. On February 6, 1980 the Fifth Circuit entered its Opinion and Order. In this Opinion, the Fifth Circuit affirmed the District Court's ruling in *Penthouse I* that Respondent McAuliffe's prosecutorial tactics had created a system of prior restraint which was unconstitutional under the First and Fourteenth Amendments, and held that "[i]njunctive and declaratory relief directed against this system is appropriate" (App. D-22). The Fifth Circuit also affirmed the District Court's ruling in *Penthouse I* and *Penthouse II* that issues of *Penthouse* must be taken as a whole in determining whether they are obscene (App. D-33). Fifth Circuit Judge Thornberry, with Judge Clark concurring, affirmed the District Court's finding in *Penthouse II* that the January, 1978 issue of *Playboy* magazine was not obscene. However, these judges reversed the District Court's finding in *Penthouse II* that the January *Penthouse* was not obscene. Both judges expressly held that the January, 1978 issue of *Penthouse* was obscene. Judge Kravitch dissented from the Fifth Circuit's reversal as to *Penthouse*. She expressly stated she would affirm the District Court's finding that the January, 1978 issue of *Penthouse* was not obscene (App. D-56).

B. *Facts relating to obscenity* vel non

The questions presented in this petition for writ of certiorari relate to the Court of Appeals' reversal of the District Court's finding that the January 1978 *Penthouse* is not obscene. Petitioner thus limits the fact statement to evidence pertaining to the obscenity *vel non* of the January, 1978 issue of *Penthouse* magazine.

Penthouse is an international magazine published primarily for men between the ages of 18 and 34 (*Penthouse II*, Adler Dep., pp. 6-7).[4] It has a national distribution of approximately 4,000,000 copies per month, and an international distribution of approximately 5,500,000 copies per month (*Penthouse II*, Adler Dep., pp. 10-11), and 60,000,000 copies per year (App. D-43, 44). In Fulton

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[4] Following the conclusion of the testimony conducted before Judge Freeman on May 18, 1978 in *Penthouse II*, the Court authorized the taking of certain depositions for evidence at trial, which depositions were submitted to the Court and considered as evidence in that case. The Adler Deposition was one of these, and will be referred to as "Adler Dep. __."

County, Georgia alone, the sales of *Penthouse* magazine average 20,000 copies per month (*Penthouse II*, Adler Dep., p. 12), and 377,864 sales per year (App. B-12, n. 11). During the year preceding the trial of *Penthouse I*, *Penthouse* magazine outsold all of its principal competitors, *Sports Illustrated*, *Psychology*, *Newsweek*, and *Playboy* on the newsstand (*Penthouse I*, Tr. I, 97). The price of a full page color advertisement during this period was about $32,000 (App. B-23).

Penthouse and its publisher, Bob Guccione, have won numerous awards for the contents of issues of *Penthouse* magazine (*Penthouse II*, Adler Dep., pp. 8-9); these issues are comparable to the January *Penthouse* (*Penthouse II*, Adler Dep., p. 10). The awards include the "Publisher of the Year Award" from Brandeis University, and an award from the Columbia University School of Journalism (App. B-37, D-46). *Penthouse* was seriously considered in recent competition by the National Magazine Awards Committee (*Penthouse II*, Tr. II, 39). Six articles from *Penthouse* were quoted in the *Congressional Record* in 1976, making *Penthouse* the most quoted magazine or journal of any description in the *Congressional Record* during the calendar year preceding the trial of *Penthouse I* (*Penthouse I*, Tr. I, 22, 23).

Penthouse has a definite format. Its publishers have established policies concerning the quality of both the editorial and pictorial content (App. D-42, 43). These standards give *Penthouse* a consistency from month to month. The general policy of the magazine is to publish a complete entertainment and informational package for men between the ages of 18 and 34. To comply with this charge, Penthouse includes in each of its monthly issues, written and pictorial information appealing to the wide

range of interests of most men in this age bracket (*Penthouse II*, Adler Dep., pp. 6, 7).

Issues of *Penthouse* magazine generally include fiction writing by some of the most noted fiction writers in the United States (*Penthouse II*, Tr. II, 43; App. B-37). Each monthly issue contains serious non-fiction writing on subjects such as politics, government, international relations and sociology, and other subjects of interest to *Penthouse* readers. These non-fiction writings are also written by nationally prominent writers and commentators. The issues include statements of opinion by noted commentators and columnists, as well as articles of investigative reporting (*Penthouse II*, Tr. II, 44-46). The issues also include evaluations of various consumer goods and advertisements from most of the prominent manufacturers of consumer goods in the automobile, stereo, fashion and clothing, tobacco and liquor industries. The issues contain jokes, cartoons, humorous sketches, and stories. Each issue also contains photographs of nude women, and articles relating to sex.

The January, 1978 issue of *Penthouse* was admitted as Exhibit 16 in *Penthouse II* (Tr. II, 39-40, 210). This issue conforms to the format established for *Penthouse* magazine, and it conforms to the standards of quality established for editorial and pictorial content (*Penthouse II*, Adler Dep., p. 10). A perusal of this magazine will show that the January *Penthouse* does conform to the Penthouse policy of presenting a complete entertainment and information publication of interest to most men in the age group to which it is directed. For example, this edition contains "The Mime", a fiction piece by the nationally prominent writer, Joyce Carol Oates (p. 76). It contains an installment of a serious non-fictional political article: "Cartergate III: The Thoughts of Chairman Brzezinski," by Craig S. Karpel (p. 52). It also contains a serious political article by nationally prominent writer, Tad Szulc, "Africa: Jimmy Carter's Vietnam" (p. 70). It includes a timely opinion by nationally prominent columnist and commentator, Nicholas von Hoffman: "Why Carter Has to Give Away the Panama Canal in Order to Sell Out Taiwan" (p. 122). It includes commentaries and criticisms of current films, books and records (pp. 46-48) and informative articles evaluating stereo components (p. 84) and Volvo automobiles (p. 180). It includes an interview with a current personality, Anita Bryant (p. 80). The January *Penthouse* contains a multitude of advertisements by nationally known manufacturers and distributors who are prominent in their respective fields of automobile manufacturing, fashion and clothing design, and other consumer related industries, including manufacturers of photography and stereo equipment, liquor and tobacco. The January 1978 *Penthouse* also very obviously includes both written and pictorial information pertaining to sex.

At the trial in *Penthouse II*, several experts testified concerning the first prong of the *Miller* test, as to whether the average person, applying contemporary community standards, would find that the work, taken as a whole, appealed to the prurient interest. The witnesses for Penthouse, Playboy and Oui distinguished, for the purpose of this first prong, between erotic material which appeals to a shameful, morbid or prurient interest in sex and erotic material which appeals to a normal or healthy interest in sex (*Penthouse II*, Tr. II, 94-95; Tr. III, 75-76). The experts testified about the community standards prevailing in metropolitan Atlanta. The Penthouse expert witness

testified that none of the material in the January 1978 *Penthouse* would, taken as a whole, appeal to the prurient interest (*Penthouse II*, Tr. III, 77-78). On the basis of conflicting testimony the District Court, applying community standards, found that *Penthouse*, taken as a whole, did not encourage a shameful or morbid, rather than a healthy interest in sex (App. C-35).

At the trial, experts testified concerning the second prong of *Miller* as to whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by a state statute. Expert witnesses distinguished between erotic material which depicts the genital area and material which constitutes a lewd exhibition of the genitals (*Penthouse II*, Tr. II, 96). One expert explained that the average person in a community the size of Atlanta would not find depictions of sexual conduct offensive, unless the depiction actually showed sexual intercourse or other sexual activity, as opposed to merely suggesting such activity (*Penthouse II*, Tr. II, 97, 98, 114). On the basis of conflicting testimony, the District Court found the material in the January 1978 *Penthouse* was not patently offensive (App. C-35).

At the trial, an expert witness for Penthouse analyzed the January issue and testified that the magazine had serious literary or political value (*Penthouse II*, Tr. II, 48, 49). On the basis of conflicting testimony, and its own independent analysis, the District Court concluded that the January, 1978 issue of *Penthouse* did not lack serious literary, artistic, political or scientific value (App. C-36).

REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS' DECISION INVOLVES A QUESTION OF FIRST AMENDMENT RIGHTS OF GREAT PUBLIC IMPORTANCE WHICH SHOULD BE SETTLED BY THIS COURT.

The District Court conducted a three day evidentiary hearing and found that neither *Penthouse* nor *Playboy*[5] satisfied any of the three requisites of the conjunctive test for obscenity set out in *Miller*. The District Court thus found that neither magazine was obscene. On appeal, Fifth Circuit Judges Thornberry and Clark agreed that *Playboy* was not obscene, but reversed the District Court's finding of non-obscenity as to *Penthouse*, expressly holding *Penthouse* to be obscene. Fifth Circuit Judge Kravitch dissented, holding that *Penthouse*, like *Playboy*, was not obscene.[6] In reversing the District Court's holding as to *Penthouse*, the Fifth Circuit has drawn a line between two of the most widely circulated monthly periodicals in the United States. The record shows that *Penthouse* circulation slightly exceeds *Playboy* circulation. Each of the publications has a similar and definite format of editorial and pictorial content. The Fifth Circuit acknowledged that the editorial policy of *Playboy* and *Penthouse* is similar (App. D-44). The Fifth Circuit also acknowledged that as a result of its editorial policies, *Penthouse* and its editor have received many journalistic awards and that the

January *Penthouse* contains numerous articles of serious value (App. D-44, 45). The Fifth Circuit noted that the large circulation and the attraction of advertising by national companies was further evidence of the serious value of the two periodicals (App. D-46). The Fifth Circuit held that both *Playboy* and *Penthouse* contain items "which, standing alone, would be found obscene" (App. D-46). Fifth Circuit Judge Thornberry held that *Playboy* contains short stories, interviews and panel discussions of "great merit", while he found similar categories of material in *Penthouse* to possess only "some literary merit" (App. D-46). Judge Thornberry held that this qualitative difference in the non-obscene content of *Playboy* and *Penthouse* precluded a finding of obscenity as to *Playboy;* he admitted the issue as to *Penthouse* was close, but on balance concluded *Penthouse* was obscene (App. D-46).

The line drawn by Judge Thornberry affects virtually every state court prosecutor in the United States because both *Playboy* and *Penthouse* are distributed in virtually every jurisdiction in the United States. Similarly, it affects those who are in any way involved in the writing, advertising, posing, photographing, publishing, distributing, selling or buying of these periodicals. It thus affects millions of people in the United States, all of whom have a vital interest in understanding why *Playboy* falls on the protected side of Judge Thornberry's line, while *Penthouse* falls on the obscene side of the line. The problem is recurring on a monthly basis because the record establishes that the January, 1978 issues of *Penthouse* and *Playboy* conform to the general standards established by each of the periodicals for pictorial and editorial content.

The line drawn by Judge Thornberry appears to be a line of taste. Judge Thornberry found that both *Penthouse* and *Playboy* constituted a "whole" within the meaning of *Miller*, rather than a bound volume of unrelated parts (App. D-44). Judge Thornberry ruled that both *Playboy* and *Penthouse* contain obscene material, though he apparently regarded the material he found to be obscene in *Penthouse* more offensive than the material he found to be obscene in *Playboy*. Judge Thornberry ruled that both magazines contain non-obscene material, though he regarded the non-obscene material in *Playboy* to be of greater value than the non-obscene material in *Penthouse*. Judge Thornberry recognized the *Miller* requirement that *Penthouse* must be taken as a whole; yet in the final analysis his decision appears to be based on his personal taste as to the separate parts, *i.e.*, how offensive he believes sexually explicit parts to be, balanced against how meritorious he believes the non-sexual or mildly sexual portions to be.

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[5] The January 1978 *Playboy* was admitted as Pl. Ex. 24, *Penthouse II*, Tr. II, 210.

[6] The Fifth Circuit decision consists of three separate opinions. Judge Clark concurred in the result of Judge Thornberry's findings as to *Penthouse;* Judge Kravitch dissented as to these findings. Where necessary for the sake of clarity, the decisions will be discussed by identification to the judge, rather than by reference to the Court.

The change of the third prong of the obscenity test from the "utterly without redeeming social value" test of *Roth v. United States*, 354 U.S. 476 (1957) and *Memoirs v. Massachusetts*, 383 U.S. 413 (1966) to the "lacks serious value" test of *Miller v. California*, 413 U.S. 15 (1973), was recognized as a change which would lessen the prosecutor's procedural burden of proving a negative. 413 U.S. at 21-22. However nothing in *Miller* is authority for an appellate court deciding obscenity on the basis of its own qualitative judgments of taste.

The Fifth Circuit's holding that the January 1978 *Penthouse* is obscene is based on an incorrect and unconstitutional interpretation of *Miller*. The decision will require prosecutors, publishers, distributors, retailers, consumers, and all others associated with the distribution of *Penthouse* magazine, and other similar publications, to second guess themselves and each other each month. Their touchstone will be only a subjective, qualitative judgment of taste. Judge Thornberry's decision that *Penthouse* is obscene has left all concerned dangerously uncertain on a month to month basis as to their First Amendment rights. The decision fails to give persons concerned with the obscenity laws the "fair notice" that was promised in *Miller*, 413 U.S. at 27. Petitioner submits that this Court should grant certiorari to eliminate this uncertainty and to correct the decision below as to *Penthouse*.

Petitioner respectfully submits that in addition to presenting a serious misinterpretation of *Miller* by the Court of Appeals, the instant case very clearly raises the question of the extent to which, and the manner in which, state regulation of sexually explicit material should continue. Indeed, the line drawn by Judge Thornberry in this case graphically illustrates Mr. Justice Stevens' remarks in his dissent to *Smith v. United States*, 431 U.S. 291, 316 (1977):

> In my judgment, the line between communications which "offend" and those which do not is too blurred to identify criminal conduct. It is also too blurred to delimit the protections of the First Amendment.

The holding in the case at bar demonstrates most of the problems Mr. Justices Brennan, Stewart and Marshall discussed in their dissent to *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 73 (1973).

The question of whether the January 1978 *Penthouse* is protected by the First Amendment is of great public importance and justifies the grant of certiorari to review the judgments of the Court below.

2. IN REVERSING THE DISTRICT COURT'S FINDING OF NON-OBSCENITY, THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AND THIS COURT'S RULINGS AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The Fifth Circuit drastically deviated from the correct standard of review in deciding that the January 1978 *Penthouse* is obscene. Petitioner respectfully submits that Judges Thornberry and Clark have misconstrued the concept of "independent review" and incorrectly substituted their *de novo* finding of obscenity for the District Court's finding of non-obscenity. The holding by Judges Thornberry and Clark is novel. Research has not disclosed any case decided under obscenity standards created by *Roth*, *Memoirs* or *Miller* in which a court of appeals has reversed a district court's finding of non-obscenity, and entered a judgment of obscenity. Further, as the Fifth Circuit frankly acknowledged, nothing in *Miller*, or in other decisions of this Court, gives the Court of Appeals the authority to conduct an "independent review" of evidence under the first prong of *Miller* involving contemporary community standards and appeal to the prurient interest (App. D-26).

The concept of "independent review" in obscenity cases was developed to enable appellate courts to protect valuable First Amendment rights from the vagaries of jury selection and decision making. It was never intended, and has never been used, by federal appellate courts as a means of declaring obscene that which has been adjudicated non-obscene in lower courts. In *Miller*, the majority discussed the concept of independent review as a means by which appellate courts could adequately protect First Amendment values. 413 U.S. at 25. The *Miller* majority made it clear that questions of appeal to prurient interest, and patent offensiveness, are not questions for independent review; rather, these are questions of fact which the triers of fact must decide by drawing on the standards of their own communities. 413 U.S. at 30. In their dissent to *Paris Adult Theatre I v. Slaton, supra*, 413 U.S. 49, 73, a companion case of *Miller*, Mr. Justices Brennan, Stewart and Marshall discussed the concept of independent review in obscenity cases. The context of their discussion of independent review assumed the triers of fact had found the pertinent material obscene, rather than non-obscene as in the case here. The Justices discussed whether it was advisable to abandon the concept of independent review and thus lessen the burden of review for appellate courts. They concluded it was not advisable because to do so would "expose much protected, sexually oriented expression to the vagaries of jury determinations." 413 U.S. at 102.

In *Smith v. United States, supra*, 431 U.S. 291, this Court considered the role of the jury and the reviewing court in obscenity cases. As to the first prong of *Miller* this Court stated that the question of appeal to the prurient interest is a question for the jury. 431 U.S. at 300-301. The Court stated that the question of patent offensiveness in the second prong is also for the jury. 431 U.S. at 301. These jury questions of appeal to the prurient interest and patent offensiveness are to be judged in light of the jurors' understanding of contemporary community standards. 431 U.S. at 309.

In *Smith*, this Court specifically instructed appellate courts as to the appropriate method of reviewing a finding of obscenity. First, the trial court's instructions to the jury could be reviewed. Second, the material could be reviewed to determine whether it depicted the type of conduct which must be present to sustain a finding of obscenity under the second prong of *Miller*. Third, the court could review the finding under the third prong as to whether the material lacks serious literary, artistic, political or scientific value. Finally, the court could review the sufficiency of the evidence. 431 U.S. at 305.

As can be seen, the scope of review under the first prong of *Miller* (appeal to the prurient interest based on contemporary community standards) is limited to an examination of the jury instructions and the sufficiency of the evidence. There is no independent review as to the first prong. District Court Judge Freeman found as a fact that, applying contemporary community standards of metropolitan Atlanta, Georgia, the January 1978 *Penthouse* did not appeal to the prurient interest. Fifth Circuit Judge Kravitch, also from Atlanta, agreed. Fifth Circuit Judges Thornberry and Clark acknowledged the contemporary community standards portion of the first prong of the *Miller* test, and acknowledged this Court had never authorized "independent review" under the first prong of *Miller* (App. D-26). Nevertheless, Judges Thornberry and Clark stated they were required to make an independent review of Judge Freeman's determination under the first prong of *Miller*. Judge Clark conceded that District Judge Freeman and Fifth Circuit Judge Kravitch were in a better position to appraise community standards in Atlanta, Georgia. Nevertheless, Judge Clark stated:

> I do not pretend to know every citizen, community, or family value that comprise that bustling, cosmopolitan metropolis, but I know enough of them to make a sure, true judgment that the average person in Atlanta applying contemporary community standards would find the January issues of both *Penthouse* and *Oui*, taken as a whole, to appeal to the prurient interest and to lack serious literary, artistic, political, or scientific value.

610 F.2d at 1374 (App. D-50). This type of appellate review is a trial *de novo* based on the circuit judges' impression of contemporary community standards in Atlanta, without reference to the record on appeal and the findings of the district judge. Such a *de novo* review of facts pertaining to the first prong of *Miller*, is not authorized by this Court. This *de novo* review is contrary to Fed. R. Civ. P. 52, which allows reversal of findings of fact by the district judge only when such findings are "clearly erroneous" under the evidence.

As this Court held in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969) at 123:

> In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues de novo. The authority of an appellate court, when reviewing the findings of a judge as well as those of a jury, is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence. The question for the appellate court under Rule 52(a) is not whether it would have made the findings the trial court did, but whether "on the entire evidence [it] is left with the definite and firm conviction that a mistake has been committed." [Citations omitted]

There are also elements in the second prong of *Miller* which cannot be independently reviewed. This Court indicated in *Smith v. United States, supra,* 431 U.S. 291, that appellate courts may make an independent review under the second prong to determine whether the material depicts the type of conduct which may be found obscene. However there is no "independent review" authorized in *Smith*, as to the other elements necessary to satisfy the second prong, *i.e.*, that the conduct found to be obscene is depicted in a patently offensive way in light of contemporary community standards. A fair reading of *Smith* is that these are jury questions which may only be reviewed on the basis of the sufficiency of evidence. In the Court below, Judges Thornberry and Clark did not limit their independent review to the question of whether the material depicted in *Penthouse* was within those categories of conduct specified in Ga. Code Ann. §26-2101(b). Rather, Judges Thornberry and Clark proceeded to decide *de novo*, the fact question of whether the conduct in *Penthouse* was depicted in a patently offensive way in light of the contemporary community standards of Atlanta, Georgia. Such a *de novo* determination of these fact issues has never been warranted by this Court, and is contrary to the "clearly erroneous" standard of Fed. R. Civ. P. 52. *Zenith Radio Corp.*, *supra*, 395 U.S. 100.

The *de novo* review made by Judges Thornberry and Clark encompassed all aspects of the multitude of fact questions implicit in a finding of obscenity. It was conducted in such a manner as to completely vitiate this Court's requirement that the questions of prurient appeal and patent offensiveness be determined in light of the contemporary community standards as determined by the trier of fact. The Fifth Circuit's *de novo* review is based on a misinterpretation of the concept of "independent review" as applied by this Court to obscenity cases. This Court should grant certiorari to correct the Court of Appeals' departure in this case from the accepted and usual course of the exercise of the power of appellate review.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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May 2, 1980

AFFIDAVIT OF SERVICE

STATE OF GEORGIA
COUNTY OF FULTON

I, James L. Paul, of Atlanta, Georgia, do hereby swear that on this ____ day of May, 1980, three copies of the Petition for Writ of Certiorari were mailed, first class postage prepaid, to Larry E. Parrish, Esq., 1525 First Tennessee Building, Memphis, Tennessee 38103, Counsel for Respondent, pursuant to Rule 33(1) of the Supreme Court Rules. I further swear that all parties required to be served have been served.

JAMES L. PAUL
3900 First National Bank Tower
Atlanta, Georgia 30303

Counsel for Petitioner

Sworn to and subscribed
before me this ____ day of
May, 1980.

Notary Public for the
State of Georgia at Large
Commission Expires March 21, 1982.

Appendices

APPENDIX A

CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTION OF THE UNITED STATES

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * * * *

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

GEORGIA CODE ANNOTATED

§ 26-2101. (Georgia Laws, 1975 Session, p. 498) Distributing obscene materials

(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word "knowing," as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter, and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. Provided, however, the character and reputation of the individual charged with an offense under this law, and if a commercial dissemination of obscene material is involved, the character and reputation of the business establishment involved may be placed in evidence by the defendant on the question of intent to violate this law. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(b) Material is obscene if:

(1) to the average person, applying contemporary community standards, taken as a whole, it predominantly appeals to the prurient interest, that is a shameful or morbid interest in nudity, sex or excretion;

(2) the material taken as a whole, lacks serious literary, artistic, political or scientific value, and

(3) the material depicts or describes, in a patently offensive way, sexual conduct specifically defined in subparagraphs (i) through (v) below:

(i) acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;

(ii) acts of masturbation;

(iii) acts involving excretory functions or lewd exhibition of the genitals;

(iv) acts of bestiality or the fondling of sex organs of animals;

(v) sexual acts of flagellation, torture or other violence indicating a sadomasochistic sexual relationship;

(c) Additionally, any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this section.

(d) Material, not otherwise obscene, may be obscene under this section if the distribution thereof, or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(e) It is an affirmative defense under this section that dissemination of the material was restricted to:

(1) a person associated with an institution of higher learning, either as a member of the faculty or a matriculated student, teaching or pursuing a course of study related to such material; or

(2) a person whose receipt of such material was authorized in writing by a licensed medical practitioner or psychiatrist.

A person convicted of distributing obscene material shall be punished as for a misdemeanor of a high and aggravated nature.

* * * * *

APPENDIX B

(PENTHOUSE I, 436 F. SUPP. 1241)

PENTHOUSE INTERNATIONAL, LTD.
v.
HINSON McAULIFFE.

HUSTLER MAGAZINE, INC.
v.
HINSON McAULIFFE.

HIGH SOCIETY MAGAZINE, INC.
v.
HINSON McAULIFFE.

MONTCALM PUBLISHING CORP.
v.
HINSON McAULIFFE.

EASTWAY ENTERPRISES, LTD.
v.
HINSON McAULIFFE.

Civ. A. Nos. 77-1238A, 77-1240A, 77-1268A,
77-1277A and 77-1276A.

United States District Court,
N. D. Georgia,
Atlanta Division.

Aug. 24, 1977.

Publishers of certain men's magazines brought actions for declaratory and injunctive relief, alleging that a county solicitor general had erected an unconstitutional system of prior restraint by engaging in a program of bad faith and harassment consisting of arrests, repeated visits to retailers and threatening comments in the press concerning the obscenity of plaintiffs' publications. The District Court, Richard C. Freeman, J., held, inter alia, that such a system of unconstitutional prior restraint had been shown.

Injunctive and declaratory relief afforded.

1. Declaratory Judgment 300
Injunction 114(2)

Publishers of men's magazines had standing to seek declaratory relief and preliminary and permanent injunctive relief against county solicitor general on allegations that, through "program" of "bad faith and harassment," consisting of arrests, repeated visits to retailers, and threatening comments in the press, so as to avoid a binding adjudication among all allegedly injured parties concerning obscenity vel non of publishers' magazines, he had erected system of prior restraint which was as insidious and effective as if subject publications had been seized by authorities for purpose of destruction. Code Ga. § 26–2101; U.S.C.A.Const. Amends. 1, 14; 42 U.S.C.A. § 1983; 28 U.S.C.A. §§ 1331, 1343(3).

2. Courts 508(7)

Doctrine of *Younger v. Harris* did not preclude federal district court from proceeding with magazine publishers' action against county solicitor general for declaratory and injunctive relief on allegations that solicitor general engaged in unconstitutional system of prior restraint by program of arrests and harassment of magazine dealers and distributors where, although criminal charges were pending against some of such dealers and distributors no such charges were pending against publishers. U.S.C.A. Const. Amend. 1.

3. Declaratory Judgment 209

Recurring controversy exception to mootness requirement applied where, even though "off sales" date had passed when action for declaratory judgment and injunctive relief involving alleged illegal prior restraint of sale of men's magazines came on for hearing, testimony established that such publications had life span of only approximately four or five weeks and local law enforcement authority testified that if he were not enjoined, he would continue to follow complained-of procedures in the future. U.S.C.A.Const. art. 3, § 1 et seq.

4. Injunction 147

Evidence in action by publishers of men's magazines for preliminary injunction against alleged unconstitutional prior restraint of publication of such magazines by local authorities supported publishers' contention that money damages were inadequate to recompense them for injuries which they allegedly had suffered. U.S.C.A.Const. Amend. 1.

5. Constitutional Law 90.1(1)

Not only distributors and retailers of men's magazines, but magazines' publishers and public itself also had rights under First Amendment to be free from illegal prior restraint on publication of such magazines. U.S.C.A.Const. Amend. 1.

6. Constitutional Law 90(3)

Fundamental purpose of First Amendment is to foreclose governmental control or manipulation of sentiments uttered to public; therefore, before presumptively protected material is involuntarily removed from market place by governmental activity which arguably is not directed toward that end, competing private and public policy interests must be carefully balanced in light of all circumstances. U.S.C.A.Const. Amend. 1.

7. Constitutional Law 90(3)

Courts must look through form to substance in determining whether system of informal censorship has been formulated; if system of prior restraint is found, it comes before federal district court bearing heavy presumption against its constitutional validity. U.S.C.A.Const. Amend. 1.

8. Constitutional Law 90.1(1)

Judicial intervention of some dimension is constitutionally required before state officials may undertake series of warrantless arrests which generate reasonably foreseeable effects in terms of removing presumptively protected speech from public eye. U.S.C.A.Const. Amend. 1.

9. Constitutional Law 90.1(8)

Unconstitutional system of prior restraint with respect to certain men's magazines was engaged in by local law enforcement authorities where such authorities did not obtain warrant from neutral and detached magistrate based on threshold determination of obscenity before making series of arrests of dealers and distributors on charges that their dealings in such magazines violated obscenity laws. U.S.C.A.Const. Amends. 1, 4, 7, 14; Code Ga. §§ 26–2101, 26–2104; U.S.C.A.Const. art. 3, § 1 et seq.; 42 U.S.C.A. § 1983; 28 U.S.C.A. §§ 1331, 1343(3); Fed.Rules Civ.Proc. rule 65(a)(2), 28 U.S.C.A.

10. Obscenity 5

Considered as a whole, August, 1977 issue of men's magazine was not obscene as lacking serious literary, artistic, political or scientific value. U.S.C.A.Const. Amend. 7; Code Ga. § 26–2101.

C. B. Rogers, Rogers & Hardin, Atlanta, Ga., for Hinson McAuliffe.

John Moore, Charles R. Hadaway, Atlanta, Ga., for Montcalm Pub. Co., Eastway Enterprises, Ltd. and High Society Magazine, Inc.

Herald Price Fahringer, Jr., Paul J. Cambria, Jr., Lipsitz, Green, Fahringer, Roll, Schuller & James, Buffalo, N. Y., for Hustler Magazine, Inc.; Foy R. Devine, Fierer & Devine, Atlanta, Ga., of counsel.

James L. Paul, Gambrell & Mobley, Atlanta, Ga., for Penthouse Intern., Ltd.; Norman Roy Grutman, New York City, of counsel.

ORDER

RICHARD C. FREEMAN, District Judge.

These are actions brought for declaratory and preliminary as well as permanent injunctive relief [1] concerning the consequences of several arrests by the Solicitor General of Fulton County, Georgia, pursuant to Ga.Code § 26–2101,[2] the Georgia obscenity statute. Plaintiffs are ject matter, and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. Provided, however, the character and reputation of the individual charged with an offense under this law, and if a commercial dissemination of obscene material is involved, the character and reputation of the business establishment involved may be placed in evidence by the defendant on the question of intent to violate this law. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

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[1] Because of the alleged temporal perishability and limited life of plaintiff's monthly publications, this court exercised its discretion under Fed.Rule 65(a)(2), Fed.R.Civ.P., and advanced the trial of this action upon the merits while consolidating it with the preliminary aspects of the action.

[2] Ga.Code § 26–2101—Distributing obscene materials

(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word "knowing," as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the sub-

(b) Material is obscene if:

(1) to the average person, applying contemporary community standards, taken as a whole, it predominantly appeals to the prurient interest, that is a shameful or morbid interest in nudity, sex or excretion;

(2) the material taken as a whole, lacks serious literary, artistic, political or scientific value, and

(3) the material depicts or describes, in a patently offensive way, sexual conduct specifically defined in subparagraphs (i) through (v) below:

(i) acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;

(ii) acts of masturbation;

(iii) acts involving excretory functions or lewd exhibition of the genitals;

(iv) acts of bestiality or the fondling of sex organs of animals;

(v) sexual acts of flagellation, torture or other violence indicating a sadomasochistic sexual relationship;

(c) Additionally, any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this section.

(d) Material, not otherwise obscene, may be obscene under this section if the distribution thereof, or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(e) It is an affirmative defense under this section that dissemination of the material was restricted to:

(1) a person associated with an institution of higher learning, either as a member of the faculty or a matriculated student, teaching or pursuing a course of study related to such material; or

(2) a person whose receipt of such material was authorized in writing by a licensed medical practitioner or psychiatrist.

A person convicted of distributing obscene material shall be punished as for a misdemeanor of a high and aggravated nature.

The Georgia statute substantially retraces the guidelines contained in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). Accordingly, the statute is not attacked upon its face.

publishers of several monthly magazines[3] whose primary local distributor and several local retailers were arrested by agents of defendant McAuliffe between July 18, 1977 and July 29, 1977.[4] Plaintiffs' substantive claims arise under the First and Fourteenth Amendments to the United States Constitution as well as under 42 U.S.C. § 1983. The jurisdiction of this court is properly predicated upon 28 U.S.C. §§ 1331 and 1343(3).[5]

Although varying somewhat in nonessential respects, each complaint avers in essence that through a "program" of "bad faith and harassment",[6] *cf. Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965) consisting of arrests, repeated visits to retailers, and threatening comments in the press, defendant avoided a binding adjudication among all of the allegedly injured parties concerning the obscenity *vel non* of the subject publications while erecting a system of prior restraint which was as insidious and effective as if the subject publications had been seized by authorities for the purpose of destruction. *See Marcus v. Search Warrants of Property, etc.*, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961). Plaintiff Penthouse International, Ltd. [hereinafter "Penthouse"] also moves this court for a declaration that the August, 1977 issue [7] of Penthouse is not obscene. Prior to the trial of these actions, the parties entered into several stipulations restricting the scope of the issues presently before this court. Those stipulations are: (1) that the instant plaintiffs are not presently the subject of any pending proceeding in state court; (2) that an arrestee apprehended during August, 1977, under Ga.Code § 26–2101, who has put up bond and has been released from custody would not come to trial within a six to eight week period following his arrest; (2) that a person arrested under the foregoing circumstances who remained in jail without bond would be tried within one week if a jury was available; (4) that since no criminal trials are held in Fulton County State Court during July or August of 1977, a person charged in June for violation of Ga.Code § 26–2101 would be tried in September; and (5) that the Fulton County Solicitor's office maintains no written procedures with respect to prosecutions under Ga.Code § 26–2101 and no written record concerning complaints about allegedly obscene material. Before proceeding to the merits of plaintiffs' claims, a recapitulation of the operative surrounding factual circumstances is warranted.

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[3] Plaintiffs are respectively: Penthouse International, Ltd., publisher of "Penthouse" magazine; Hustler Magazine, Inc., publisher of "Hustler" magazine; High Society Magazine, Inc., publisher of "High Society" magazine; Montcalm Publishing Corporation, publisher of "Gallery" magazine; and Eastway Enterprises, Ltd., publisher of "Eros" magazine.

[4] Although no arrests were made concerning one of the subject publications, "Gallery" magazine, published by Eastway Enterprises, Ltd., there was testimony by Mr. Shapiro, the editor of "Gallery" that his magazine was withdrawn from the stand at the same time when the other plaintiffs' publications were withdrawn.

[5] Although several of the plaintiffs, including specifically Montcalm Publishing Corporation and Eastway Enterprises, Ltd., sell too few publications to credibly meet the $10,000 jurisdictional requirement with respect to the general federal question statute, 28 U.S.C. § 1331 it is nevertheless clear that jurisdiction is proper as to them under 28 U.S.C. § 1343(3).

[6] Although plaintiff "Penthouse" cross-examined defendant McAuliffe extensively concerning his admittedly strongly held religious and moral beliefs, the parties seem to agree upon closing argument that Mr. McAuliffe's enforcement efforts were simply an attempt by him to do what he perceived to be his job in a most effective albeit arguably unconstitutional manner.

Mr. McAuliffe testified that for some time prior to the making of any arrests by his office, he had received complaints from persons using Hartsfield International Airport that "obscene" materials were being vended at the airport newsstands. On July 18, 1977, Mr. Ira W. Brown, an officer from the solicitor's office, and Mr. C. A. Smith, a Fulton County Deputy Sheriff, proceeded to Hartsfield International Airport where they observed two of the nine newsstands selling "Hustler", "High Society", "Oui", "Genesis", "Playboy" and other magazines presumably of a similar character. Mr. Brown bought a "Hustler" magazine from cashier Debbie Hazelrigs and asked her for the manager's name. Ms. Hazelrigs stated that a Mr. Poss was the manager of the stand but that he was away from his desk. Mr. Brown paged Mr. Poss and waited approximately forty-five minutes for his arrival at the stand before observing two newsstand employees removing several of the subject publications from the newsstand racks. Mr. Brown then purchased copies of "Genesis", "Penthouse", and "Oui" from Ms. Hazelrigs. Mr. Poss finally was located in the concourse and was taken to his office where under questioning from Mr. Brown, he stated that he was familiar with the subject magazines but did not read them himself. Mr. Poss was then arrested without a warrant for violation of Ga.Code § 26–2101 and was transported to Fulton County Jail.

On the same day, Mr. Sidney Gordon was arrested without a warrant at Mill's Discount Drugs in Atlanta, Georgia, following a purchase by one of Mr. McAuliffe's agents of a copy of "Hustler" magazine.

On the following day, July 19, 1977, Mr. Asa Hall was arrested without a warrant at Nifty Foods in College Park, Georgia, following the sale to agents of the Solicitor General's office of copies of "Oui", "Genesis" and "High

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[7] Under *Near v. Minnesota,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1930), it is clear that each issue of a periodical publication such as the instant magazines are separate and distinct and must therefore be considered individually upon their respective merits.

Society." On that date articles appeared in both The Atlanta Constitution and The Atlanta Journal chronicling the arrests and containing quotations from and interpretations of interviews with Solicitor McAuliffe. Ken Willis of The Atlanta Constitution testified that his article correctly quoted Mr. McAuliffe when it credited him with the statement that "[i]f they [the retail vendors] put them [the subject magazines] out for sale, we'll get them [the vendors] and whoever is involved will go to jail." Vicki Brown of The Atlanta Journal testified that Mr. McAuliffe, in the context of a telephonic interview, had suggested to her that if the arguably pornographic magazines being sold in Fulton County were not removed from the newsstands, more arrests would be made.

On July 21, 1977, Mr. Edward Elson, President of Atlanta News Agency, Inc.,[8] the primary local distributor of the subject magazines, was arrested for the sale of eight enumerated magazines: "The Best of Hustler II", the June, July and August editions of "Hustler", the June and July editions of "High Society", the August edition of "Genesis", and the August edition of "Oui."

No further arrests were made until July 27, 1977. On that date an article appeared in the morning Atlanta newspaper, The Atlanta Constitution, quoting Mr. McAuliffe as stating that "[o]bviously it . . . is working because they [the men doing the checking] haven't found anything in violation of the law." The article went on to reveal that Constitution investigators had found two

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[8] Atlanta News Agency, Inc., services between 850 and 900 retail outlets or newsstands in Fulton County and over two thousand such establishments in the greater Atlanta metropolitan area. It distributes over two thousand different publications, including the subject magazines. In addition, it employs over 275 people and operates approximately 90 trucks.

newsstands still vending the subject publications: the Eastern Newsstand in Peachtree Center and the Dixie News on Decatur Street. By nightfall the proprietors of both newsstands had been arrested without a warrant for selling, respectively, a copy of "Oui" and copies of "Eros", "Men", and "Masturbation."

A final arrest of Mr. Miller Bright was made on July 29, 1977, without a warrant at Brothers III Package and Grocery Store for the sale of "Best of Guys and Gals" and "Best of Swank." On that day, "Penthouse" and "Hustler" filed their respective actions, and, after an in chambers hearing at which allegations concerning the perishability of the subject publications were made, this court issued a temporary restraining order against defendant McAuliffe. On August 2, 1977 "High Society" filed a similarly styled action followed by "Eros" and "Gallery" on August 4, 1977. The preliminary injunction hearing was originally scheduled for August 8, 1977, but was rescheduled for August 15, 1977, due to the inability of the parties to timely complete expedited discovery. The preliminary and permanent aspects[9] of these consolidated actions were tried at a hearing commencing on August 15, 1977 and concluding on August 16, 1977. Oral argument was heard on the morning of August 17, 1977. The issues presented are now ripe for adjudication.

STANDING

[1] A threshold issue which bears mention concerns the standing of the instant plaintiff publishers to bring this action. Plaintiffs have vigorously argued that they have the type of concrete interest in the outcome of this litigation upon which the notion of standing is predicated.

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[9] *See* fn. 1, *supra*.

Bantam Books v. Sullivan, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963); *Baker v. Carr,* 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). In *Bantam Books v. Sullivan, supra,* the Supreme Court upheld the standing of a publisher to challenge the effective ban of its books under Rhode Island law by a "Commission to Encourage Morality in Youth". In reaching its determination, the Court reflected upon the realities of the publishing world and noted that the financial detriment which retailers suffered by removing a particular publication from their stands is smaller than either the cumulative economic effect experienced by a publisher or the cost of fighting withdrawal of the publication in court.[10] It is equally true in the instant action that plaintiffs are the most financially aggrieved parties and that they alone have the resources to vindicate the arguably infringed rights of the public and of those persons in the chain of distribution. Moreover, although the majority of the testimony of Mr. Guccione, editor and publisher of "Penthouse", and the other publishers went mostly to the allegedly irreparable nature of their injury, it is nevertheless clear that approximately eighty-two thousand [11] presently warehoused magazines which retail for between $1.50 and $2.00 per copy will

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[10] Mr. Grutman, counsel for plaintiff, "Penthouse", upon oral argument equated the Solicitor's pursuit of the instant retailers to the pursuit of "Minnows" by "Jaws". The simile when examined in terms of resources which are at the disposal of the respective parties is not altogether inapposite.

[11] SALES FULTON COUNTY

	Annual	Highest Month
Hustler	265,829	31,960
Penthouse	377,864	35,489
High Society	45,166	4,814
Gallery	91,104	9,044
Eros (June, July & Aug. 1977)	291 (3 mos.)	109 (highest mo.)

lose some or all of their value [12] if they are not made available for sale shortly. Under these circumstances, we have no difficulty concluding that plaintiffs' standing has not been nor could it be successfully challenged. *Bantam Books, Inc. v. Sullivan, supra,* at 64 note 6, 83 S.Ct. 631 (1963); *see also Grandco Corp. v. Rochford,* 536 F.2d 197 (7th Cir. 1976); *Allied Artists Picture Corp. v. Alford,* 410 F.Supp. 1348 (W.D.Tenn.1976). Accordingly, we will proceed to consider defendant's contention that this court must abstain and dismiss the instant action due to the ongoing state criminal prosecutions.

YOUNGER v. HARRIS AND ITS PROGENY

[2] Defendant has vigorously argued that the instant proceeding for declaratory and injunctive relief must be dismissed because of its potential for "interference" with the ongoing state criminal prosecutions of previously arrested retailers. Since *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908) it has been clear that in certain circumstances a federal court can enjoin the enforcement of a state statute on constitutional grounds. However, *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and its progeny make it clear that the scope of a federal court's intervention must be carefully limited in the interests of comity and federalism where ongoing state prosecutions are involved. Defendant's argument that the *Younger* line of cases is applicable here is somewhat anomalous in view of the stipulation that no state court proceedings are presently pending against plaintiffs. Nevertheless, defendant appears to contend that granting declaratory or injunctive relief in the instant action would "disrupt" subsequent proceedings in state court. The cases circumscribing *Younger* have limited it in two important ways without apparently making the distinction which defendant posits. First, *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965), suggests that *Younger* may be avoided where there are substantial and well supported allegations that the state court proceedings are undertaken in bad faith with the purpose of harassment under, for instance, a facially unconstitutional statute.

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[12] Some of the magazines which contain relatively more offensive material also contain less national advertising and therefore would appear to be injured less by the passage of their "off sales" date. Nevertheless, there was testimony by Mr. Shapiro, editor of "Gallery" and Mr. Crespo, circulation director of "High Society" that their publications bore monthly dates and that their professional opinion based upon several years experience in the magazine business, was that customers would buy a later issue and only a later issue of their magazine when two different monthly issues were sold side by side on the newsstand. Accordingly, even these magazines would lose some of their value after their "off sales" date has passed.

The second and most important limitation upon *Younger* is a temporal one which provides that if there is a justiciable case or controversy which is not yet the subject of state court proceedings, federal intervention is permitted since the state has not yet chosen to act and therefore federal action could not offend notions of comity and federalism. In temporal terms, the instant action is precisely in the foregoing "post act—pre prosecution" procedural posture [13] because plaintiffs have vended the subject magazines but have not yet been prosecuted in state

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[13] If plaintiffs had been indicted shortly after this action had originally been filed, we concede that we would have been required to surrender jurisdiction over the action. *Hicks v. Miranda*, 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975). However, since no indictment insued and since the instant proceedings are now far more than embryonic, we would not surrender jurisdiction here, even if indictments were now forthcoming.

court for so doing.[14] In *Steffel v. Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974), the Supreme Court considered the applicability of *Younger* to a situation in which plaintiff was handbilling against the Vietnam war when officers threatened him with prosecution under a Georgia statute. Eventually plaintiff's companion was arrested and plaintiff proceeded to federal court seeking a declaration that the statute was unconstitutional.[15] The Supreme Court held that there was an actual controversy sufficient to constitute possible irreparable injury and since no state court prosecution was presently pending against the plaintiff, *Younger* did not bar entry of a declaratory judgment. A similar determination was reached in *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975), in the context of a prayer for injunctive relief. In *Doran*, three topless bars were shut down pursuant to a local ordinance. One bar reopened the day after it filed its federal complaint and was promptly served with a state criminal summons. The other two bars were not served with criminal process. The Court held *inter alia* that the two bars which had not been served with criminal process could obtain preliminary injunctive relief because "the issuance of a preliminary injunction is not subject to the restrictions of *Younger* . . . In the absence of [a state criminal] proceeding, . . . a plaintiff may challenge the constitutionality of [a] state statute in federal court." *Id.* at 930, 95 S.Ct. at 2567.

Steffel and *Doran* also stand upon strong policy grounds which support with equal vitality the decision which we reach. In addition to the notions of comity and federalism, *Younger* was bottomed upon a presumption articulated once more in Mr. Justice Rehnquist's opinion in *Doran*,[16] that a state court is fully competent to adjudicate federal constitutional claims and should have an opportunity to do so when confronted with them through the vehicle of a state criminal proceeding. It is uncontroverted by defendant that the instant plaintiffs are not proper parties to the state criminal actions pending against their distributor and retailers and that even if they wished to interject themselves into those proceedings they could not do so. Therefore, any "interference" with the ongoing state proceedings which may flow from this action must be tolerated since the state forum is not now an adequate one in which plaintiffs may vindicate their federally secured rights. *See Judice v. Vail*, 430 U.S. 327, 97 S.Ct. 1211, 51 L.Ed.2d 376 (1977).

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[14] Mr. McAuliffe candidly stated in the temporary restraining order hearing of July 29, 1977, that it was his intention to eventually prosecute the editors of each of the subject magazines.

[15] Although an injunction was originally requested in *Steffel*, the prayer was withdrawn before the action reached the Supreme Court.

None of the cases cited by defendant dictates a contrary result. In *Huffman v. Pursue Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975), there was an ongoing state proceeding which happened to be civil or, perhaps more accurately, quasi-criminal in nature. In *Kugler v. Helfant*, 421 U.S. 117, 95 S.Ct. 1524, 44 L.Ed.2d 15 (1975), *rehearing denied*, 421 U.S. 1017, 95 S.Ct. 2425, 44 L.Ed.2d 686, the state court proceedings had gone well beyond the indictment stage. Likewise, in *Perez v. Ledesma*, 401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1971), the state court proceedings had already been commenced by the filing of

an information. Finally, in *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977), the Court merely held that where plaintiff had been convicted of several violations of a state law forbidding the covering of any portion of a license plate, *Younger* did not bar purely prospective federal injunctive relief such as that which the instant plaintiffs now seek.

Defendant "Hustler" has also obliquely implied upon closing argument that plaintiff Penthouse's claim for declaratory relief might be barred by *Younger* because such a declaration would directly interfere with the state court prosecution of Mr. Poss for sale of "Penthouse." The correct response to plaintiff Hustler's suggestion is that any inconsistency in result between the instant declaratory judgment action and the state court proceedings flows not from a potential *Younger* problem but rather from anticipated inconsistent determinations reached by various potential triers of fact under the obscenity test enunciated in *Miller v. California*, 413 U.S. 15, 26 note 9, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). In any event, Mr. McAuliffe conceded upon cross examination that the weakest case of the several cases which his office had recently made was the case against Mr. Poss for the sale of "Penthouse" and that the prosecution as to that count may be declined. Since Mr. Poss' arrest was the only one involving the sale of "Penthouse", there are no ongoing state proceedings which might conceivably touch upon the issue of the alleged obscenity of the August, 1977 issue of "Penthouse" magazine. Accordingly, *Younger* is inapplicable to plaintiff Penthouse's declaratory judgment action.

In sum, the stipulation concerning the absence of any ongoing state proceedings involving the instant plaintiffs when coupled with the holdings of *Steffel v. Thompson, supra*, and *Doran v. Salem Inn, Inc., supra*, does not require this court to abstain and dismiss the instant actions.

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[16] Mr. Justice Rehnquist's opinion in *Doran* expresses justifiable concern for the havoc which permanent injunctions may reek upon proper and justifiable state action. This court realizes that its paramount duty in the instant action is to afford plaintiffs the minimum safeguards provided by our federal Constitution while intruding as little as possible upon the prerogatives of state officials.

MOOTNESS

[**3**] Defendant also suggests that two of these actions are now moot because Mr. Shapiro, editor of "Gallery" magazine, and Mr. Crespo, circulation director of "High Society" magazine, testified that their organizations would not sell the August issue of their magazines even if any possible legal impediments to such sales were removed because the "off sales" date [17] for those magazines has now passed and the September issues are awaiting distribution.

It is well settled that the power of federal courts is subject to the inherent limitations of the Article III "case or controversy" requirement and that, therefore, federal courts may resolve only justiciable or live controversies that can affect the rights of the litigants in the cases before them. *E. g., DeFunis v. Odegaard*, 416 U.S. 312, 316, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974); *Sosna v. State of Iowa*, 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d 532 (1975). Nevertheless, plaintiffs contend almost *sub silencio* that the instant circumstances fit within the judicially carved exception to the mootness doctrine because the issue and claims presented are "capable of repetition, yet evading review." *See e. g. Doe v. Bolton*, 410 U.S. 179, 187, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973); *Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969); *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515, 31 S.Ct. 279, 55 L.Ed. 310 (1911).

The exception has been applied most often in cases involving factual circumstances in which the issues and particularly the status of the parties change periodically or are of relatively short duration. *See, e. g., Doe v. Bolton, supra; Gerstein v. Pugh*, 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975); *McGill v. Parsons*, 532 F.2d 484 (5th Cir. 1976). The Supreme Court has articulated the doctrine in terms of a two fold test:

> (1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration; and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.

Weinstein v. Bradford, 423 U.S. 147, 149, 96 S.Ct. 347, 349, 46 L.Ed.2d 350 (1975) (emphasis added); *see also Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 94 S.Ct. 1694, 40 L.Ed.2d 1 (1974); *Franks v. Bowman Transportation Co., Inc.*, 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976); *In re Security Investment Properties, Inc.*, 406 F.Supp. 628, 631 (N.D.Ga.1975); *Alberta Shumate, et al. v. T. M. "Jim" Parham*, C76–838A (N.D.Ga. Feb. 22, 1977).

In the instant proceedings, there was testimony by Mr. William Marlict of Tinker, Campbell and Ewald advertising agency that magazines such as the subject publication have a life span of approximately four to five weeks. Although certain of these publications arguably have longer life spans since they have less national advertising which demands timely conveyance to the public in conjunction with major advertising campaigns, the only evidence given on the subject by Mr. Guccione and Mr. Shapiro suggested that most of the sales of these publications transpire within the first two weeks of the sales period and that all of the subject publications would be superceded and removed from the shelf within approximately thirty days from the "on sales" dates.

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[17] Mr. Guccione, editor of "Penthouse" magazine, testified that the "on sales" or release date for the August, 1977, issue of his magazine was on or about July 15, 1977, and that the "off sales" or removal date was approximately 30 days therefrom.

Moreover, Mr. McAuliffe testified that if he were not enjoined he would continue to follow the complained of procedures in the future, presumably subjecting "Gallery" and the remaining plaintiffs to precisely the same variety of injury which they allege they are presently suffering. In view of Mr. McAuliffe's testimony and the brief period of time within which the instant issue may be litigated, we conclude that the circumstances of these actions fit within the recurring controversy exception to the mootness requirement and that the passage of the "off sales" date of "Gallery" and "High Society" magazines as well as that of the balance of plaintiffs' magazines does not render these actions moot.

THE PROPRIETY OF EQUITABLE RELIEF—IRREPARABLE INJURY

[4] Defendant has also argued before this court that we may not invoke the equitable powers with which a federal court is vested because money damages are adequate to recompense plaintiffs for the injury which they allegedly have suffered.

The propriety of granting an injunction ultimately turns upon the following traditional prerequisites to equitable relief:

> (1) [success] . . . on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) . . . the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary [and permanent] injunction will not disserve the public interest.

Morgan v. Fletcher, 518 F.2d 236, 239 (5th Cir. 1975); *see e. g., Sadler v. 218 Housing Corp.*, 417 F.Supp. 348 (N.D. Ga.1976); *Hawthorn Environmental Association v. Coleman*, D.C., 417 F.Supp. 1091, *affirmed*, 551 F.2d 1055 (5th Cir. 1977). A great deal of the testimony which was taken involves industry practices in the area of so-called "sophisticated men's magazines" and goes to the question of whether or not plaintiffs have suffered any irreparable injury. Mr. Guccione testified that the failure of retailers to sell Penthouse magazine in the Atlanta area has pernicious effects upon the "Penthouse" organization in terms of: (1) the circulation of his publication; (2) the procurement of advertisers; and (3) the attraction of the works of nationally known writers. Mr. Guccione, Mr. Shapiro and Mr. Crespo testified that it is standard practice in the industry for the publisher to design, publish and manufacture its own magazine. At that juncture the material is forwarded to a printing company[18] for reproduction in final form. A subsidiary of the printing company typically acts as an exclusive national distributor for the magazine. Thereafter, the magazine is distributed to regional or local distributors who in turn sell the magazine to local retailers.[19] In Fulton County, the largest local distributor

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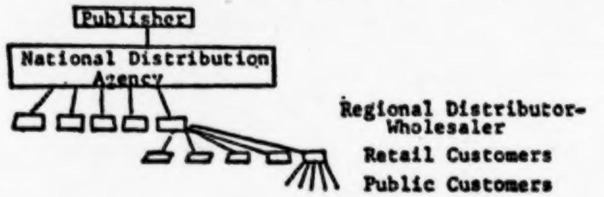
[18] "Penthouse" is printed by Curtis Printing Co. and distributed nationally by Curtis Circulating Co., a subsidiary of Caden Industries.

[19] DISTRIBUTION CHAIN FOR "HUSTLER" MAGAZINE



is Atlanta News Agency, Inc., which services approximately 850 to 900 retail outlets with about 2,000 different magazines. The next largest regional distributor is Muscogee News Company which services approximately 50 retail outlets in Fulton County.

Evidently, it is also typical in the industry for a publisher to have a written contractual agreement with the national printing and circulation companies only.[20] The national distributor in turn is responsible for dealing with a regional or local distributor. Retailers may return unsold copies of a magazine after their "off sales" date has passed and obtain refunds. The regional distributor or wholesaler in turn will destroy almost all of the unsold publications and return to the publisher for reimbursement either the covers or an affidavit as to how many magazines were destroyed. The national distributor receives a percentage of the sales price of the magazines sold at the end of the month. However, several subsequent reconciliations are made at various times up to one year after the "off sales" date when a final reconciliation is made. In any event, credible testimony given before this court suggests that plaintiffs as a group lost approximately $180,000.00 on sales of the August issues of their magazines, which will be born respectively by the publishers (50%), the national distributors (10%), the wholesalers (20%) and the Atlanta retailers (20%).

Revenue also flows in part from international, national, and regional advertising as well as from sales. Mr. Guccione testified that "Penthouse," which is produced on a regional basis in five or six distribution areas across the United States and Canada, has approximately 700 advertisers and charges about $32,000 per full page advertisement. The cost per page of advertising is in turn directly related to the magazine's circulation as it is measured by the "Audit Bureau of Circulation".[21] If circulation drops below a guaranteed level, the magazine must rebate a percentage of the unfulfilled guarantee to advertisers. Mr. Guccione testified that the effect of rebate was not felt merely in terms of lost revenue but also entailed adverse psychological effects in readership and advertiser interest which may flow from reports of diminished circulation. Mr. Erwin E. Billman, executive vice president and chief operating officer of "Penthouse" testified that diminished circulation would harm a magazine's "credibility" in the distribution field and result in loss of chain store sales. In addition, Mr. Billman stated that the loss of fifty-five to sixty thousand anticipated sales of the August, 1977 issue of Penthouse in the Atlanta market would have a significant yet unquantifiable adverse effect upon Penthouse's circulation figures. Finally, Mr. George Loin, President of Creamer F.S.R., a large national advertising firm which now represents "Penthouse", testified that if the approximately 720,000 sales of Penthouse made per year in Fulton County were not made this year, the effect upon Penthouse's ability to obtain national advertising could be "devastating." While defendant sought to impeach several of plaintiffs' witnesses with respect to some of plaintiffs' publications which have less national advertising, the only direct evidence which was presented upon the subject in the form of testimony by Mr. Shapiro and

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[20] Copies of plaintiffs' agreements with their respective national distributors are now a part of this record.

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[21] Apparently "sophisticated men's magazines" are favored somewhat by advertisers because most of their sales occur over the counter where the likelihood of actual readership is greater than the subscription sales, and because "pass along" readership by nonpurchasers is quite high.

Mr. Crespo suggested that the remaining plaintiffs would also be adversely effected to some degree.

Moreover, Mr. Guccione testified that if the circulation of "Penthouse" fell or it was adjudicated obscene,[22] the magazine's credibility and ability to attract national writers would be substantially impeded. Finally, the perishability of the subject publications, coupled with the cost of their storage and the economic unfeasability of transferring them from one to another location for retail sale, weighs heavily in favor of invoking the equitable jurisdiction of this court. In sum, since the likelihood is great that plaintiffs will jointly and severally suffer substantial irreparable injury in the areas of circulation, attraction of advertising, and possibly even editorial content, as a result of defendant's actions, we conclude that this court should consider plaintiffs' claims upon their respective merits.

PRIOR RESTRAINT

The gravamen of plaintiffs' argument is that through systematic visits to plaintiffs' Atlanta retailers, widespread public announcements, and a "program" of carefully timed warrantless arrests, defendant accomplished a "constructive seizure" of plaintiffs' publications without first affording plaintiffs or the public any opportunity to have the propriety of the seizures scrutinized by a "neutral and detached magistrate not involved in the competitive business of law enforcement." *Coolidge v. New Hampshire*, 403 U.S. 443, 453, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).

The constitutional guideposts upon the road of plaintiffs' argument are few. However, the factual basis upon

which plaintiffs' argument is predicated is well developed and bears careful scrutiny. The propriety of the application of plaintiffs' abstract premise to the circumstances of the actions *sub judice* is a question which turns ultimately upon the issues of: (1) whether or not the withdrawal of the subject publications from the Atlanta market was voluntary; and (2) whether or not there was a constructive seizure of those materials within the meaning of *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973), *Bantam Books v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963) and *Roaden v. Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973).

On July 18, 1977 agents of Mr. McAuliffe made two arrests. The next day one more arrest was made and an article appeared in The Atlanta Constitution containing a comment by Mr. McAuliffe which made it clear that any one selling the subject publications was subject to arrest. Ms. Jean Ferguson, manager of Elson's Arcade in the Peachtree Plaza Hotel testified that on or about July 19, 1977, a man came to her store and identified himself as being from the Fulton County Solicitor's office. He then showed Ms. Ferguson pertinent portions of a copy of "Oui" magazine taken from the newsstand in Elson's Arcade and asked her if she knew what she was selling.[23] She expressed her distaste for portions of the magazine and said that she had not known what it contained. The man then tried to purchase the magazine from Ms. Ferguson and, when she refused to sell it to him, commented that she was "lucky" that she had not elected to sell it. Ms. Ferguson further testified that two men with badges visited her later the same day and specifically asked for a copy of "Hustler" magazine. However, prior to the second visit, Ms. Ferguson had taken all of the subject magazines off of the stand due to her fear of arrest. Ms. Ferguson culminated her testimony by stating that she had never been in trouble with law enforcement officials and that she felt harassed by the three officers who had come to her store on the day in question.

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[22] The putative obscenity of "Penthouse" is a question which must be addressed in another context upon its merit. *See infra* pages 1256–1257.

[23] While this inquiry might be interpreted as a friendly gesture, it also might be interpreted as an attempt either to restrain the sale of the subject publication or to obtain evidence of scienter necessary for a criminal prosecution.

Mr. Glen Terry Brock, owner of West End News, and President of Atlanta Science Fiction Conference, testified that he had removed all of the subject magazines from his racks on the evening of July 18, 1977, in an attempt to comply with what he perceived to be the enforcement effort of the solicitor's office. On the morning of July 19, 1977, officer Smith and Mr. Ira Brown from the solicitor's office visited Mr. Brock's store and commented that Mr. Brock was "a lucky son of a gun" because none of the subject magazines which would have subjected him to arrest were on the rack. In addition, the officers allegedly threatened Mr. Brock with arrest if he moved "Playboy" magazine closer to the sales counter.

Mr. Charles M. Roberts, a former staff sergeant, editor of an army newspaper, and A.B.C. television employee testified that he heard about the arrests on the radio and pulled all of the subject publications off his rack leaving only "Playboy" in their place.[24] He then called the solicitor's office in an attempt to obtain some sort of guidelines

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[24] Mr. McAuliffe testified that his officers made the decision as to which magazines were obscene pursuant to the general legal instructions given by him. In addition, he stated when showed a copy of the August, 1977 issue of "Playboy" that in his opinion persons selling "Playboy" were not immune from arrest for its sale and it was probably no more than coincidence that a vendor of "Playboy" had not been arrested.

concerning the publications which might subject him to arrest but was given no such information. Rather he was told to "get a lawyer" and a copy of Ga.Code § 26–2101, the obscenity statute.[25]

On July 21, 1977, Mr. Edward Elson was arrested and charged with eight counts of violating Ga.Code § 26–2101. Mr. Elson's Atlanta News Agency, Inc. services approximately 90% of the approximately 1,000 retail outlets in Fulton County, Georgia. In addition, Mr. Elson's firm employs over 275 people and operates approximately 90 trucks. The next largest wholesale distributor, Muscogee News Agency, has approximately four trucks and services about 50 local retailers. Other wholesale distributors have a negligible impact upon the Atlanta market.[26] After Mr. Elson's arrest, Atlanta News Agency refused to sell plaintiffs' magazines.[27]

Plaintiffs' national distributors fulfilled their contractual obligation to plaintiffs by approaching other local wholesale distributors in an attempt to have them distribute plaintiff's magazines. There was a good deal of testimony by Mr. McCoy, chief financial officer of Atlanta News Agency which suggested that other wholesalers would have had almost insurmountable difficulties in assuming Atlanta News Agency, Inc.'s role because of the lack of resources and computer technology necessary to adequately service 900 retail news operations. In any event, the remaining wholesalers declined to assume distribution rights to plaintiffs' publications.

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[25] *See* fn. 2, *supra*.

[26] For example, Southern News has a single truck and employs four or five persons.

[27] Mr. Elson did not testify, possibly because the defendant who had subpoenaed him, believed that he could not help their case and plaintiffs did not wish to further embarrass him. Nevertheless, Mr. McCoy, chief financial officer of Atlanta News Agency, stated that his firm was no longer vending plaintiffs magazine and would not do so until this action was decided.

No more arrests occurred until an article appeared in the Atlanta Constitution on the morning of July 27, 1977, in which it was suggested that the "crackdown" had been almost completely effective in driving the subject publications off the stand save for two stands which had been observed by Atlanta Constitution reporters vending some of plaintiffs' publications. By the evening of July 27, the proprietors of both stands had been arrested.

Mr. McAuliffe admitted to some extent upon cross examination that retail dealers in plaintiffs' magazines were different in kind from owners of "yellow front" bookstores in that plaintiffs' retailers deal in a variety of clearly non-obscene material and are more fearful of the specter of arrest than those more familiar with the threat. Mr. Harrod of Magic Markets, a large southeastern convenience store chain and a principal retailer of "Penthouse" stated that he received several calls from managers concerned about the possibility of arrest and decided on balance that the potential problem was too great to warrant continued sale of "Penthouse" in the Fulton County area. Nevertheless, Mr. McAuliffe averred that he did not foresee that plaintiffs' publications would be withdrawn from local newsstands and characterized their withdrawal as a "side effect" of the arrests which did not flow from any intention to harass.[28] Regardless of what Mr. McAuliffe states

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[28] Mr. McAuliffe strains credulity by asserting that he did not know what effects would flow from the subject arrests. Moreover, it is arguable that if seven arrests had been made on the same day the effect thereof would have been less pernicious and stifling of plaintiffs First Amendment rights than the "arrest-a-few—then-wait-and-see" approach which was pursued by the Solicitor's office. While this court cannot be the final arbitor of Mr. McAuliffe's subjective good faith

to be his subjective good faith intentions, the clear weight of the evidence demonstrates that removal of plaintiffs' publications from the newsstands in Fulton County, Georgia, on or before July 29, 1977, was not voluntary. Accordingly, we must proceed to determine the constitutional consequences of the removal and to some degree the proper parameters of official authority in the area of First Amendment protection.

[5] While the law in this area is far from clear, the solicitor's office appears to have been laboring under several basic constitutional misconceptions. First, Mr. Hadaway, defendant's counsel, argued in essence that the only First Amendment rights in issue were those of the distributor and retailers and that those rights could have been adequately vindicated in the state court proceedings. This view overlooks the First Amendment right of the publisher, *see Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967); *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971); and, most importantly, of the people. *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972) (The First Amendment was not intended merely to shield persons engaged in newspaper work from unwarranted governmental harassment but rather was intended to serve the larger purpose of protecting public access to information). *Firestone v. Time, Inc.*, 460 F.2d 712 (5th Cir. 1972), *cert. denied*,

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or bad faith, it is clear that the actions of the Solicitor's office were in fact viewed as harassment by retailers and had the effect of removing plaintiffs' publications from the stands. *Cf. Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965). Therefore, the maximum number and timing of arrests which defendant could legally have made before impinging upon plaintiffs' First Amendment rights and the First Amendment rights of the public is not a question with which we must deal. Accordingly, we decline to do so.

409 U.S. 875, 93 S.Ct. 120, 34 L.Ed.2d 127 (The immunity conferred by the First Amendment in favor of a publication is designed more for protection of the public generally than it is for the publisher himself); *Blount v. Rizzi*, 400 U.S. 410, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971).

Second, there is substantial evidence that defendant believes that he or his agents may properly make the initial determination concerning the obscenity of any material and may make an arrest without a warrant for the sale of the subject material. Mr Rhodes, an attorney in the solicitor's office, voiced this view but failed to adequately answer the question of who would protect the public's presumptive right of access to the material. In addition, Mr. McAuliffe suggested upon deposition that obscene material is "contraband" [29] and may be seized accordingly. Apparently, Mr. McAuliffe's misconception flows from the tautology articulated by Mr. Hadaway that while First Amendment material is protected, obscene material is not within the First Amendment and therefore may render its seller subject to arrest without a warrant. As plaintiffs contend, this position stands the First Amendment upon its head by placing the burden of proving nonobscenity upon the seller. Courts have uniformly rejected any such attempt to undermine First Amendment guarantees. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975); *New York Times Co. v. United States, supra; Bantam Books v. Sullivan, supra.*

[6] Moreover, it is precisely because the object of Mr. McAuliffe's seizure was of *presumptively protected* First

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[29] Possibly Mr. McAuliffe derived this interpretation from Ga. Code, § 26–2104 which states that:

> **Any materials declared to be obscene by provisions of this Chapter and advertisements for such materials are hereby declared to be contraband.**

Amendment material, *see Cinema Classics Limited v. Burch*, 339 F.Supp. 43 (C.D.Cal.1972), *affirmed*, 409 U.S. 807, 93 S.Ct. 105, 34 L.Ed.2d 66, that greater procedural safeguards must be afforded before seizure, or "constructive seizure", can be countenanced. *Roaden v. Kentucky, supra.* As several courts have noted, a fundamental purpose of the First Amendment is to foreclose governmental control or manipulation of the sentiments uttered to the public. *Main Road v. Aytch*, 522 F.2d 1080 (3rd Cir. 1975), *Cox v. State of Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965) *rehearing denied*, 380 U.S. 926, 85 S.Ct. 879, 13 L.Ed.2d 814, *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, 89 S.Ct. 347, 21 L.Ed.2d 325 (1968). Therefore, before presumptively protected material is involuntarily removed from the market place by governmental activity which arguably is not directed toward that end, competing private and public policy interests must be carefully balanced in light of all the circumstances. *Nebraska Press Association v. Stuart*, 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683 (1976).

[7] It is clear in the first instance that courts must look through form to substance in determining whether a system of informal censorship has been formulated. *Allied Artists Picture Corp. v. Alford*, 410 F.Supp. 1348 (W.D. Tenn.1976); *Bantam Books v. Sullivan, supra.* If a system of prior restraint is found, it comes before this court bearing a heavy presumption against its constitutional validity. *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1930); *Lovell v. City of Griffin*, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938); *Schneider v. New Jersey*, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939); *Cantwell v. Connecticut*, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). Plaintiffs argue on the basis of *Heller v. New York, supra; Bantam Books v. Sullivan, supra;* and

Roaden v. Kentucky, supra, that the Fulton County Solicitor's office has put in place such a system.

In *Bantam Books v. Sullivan,* 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963), Rhode Island law had created a "Commission to Encourage Morality in Youth" which expressed opinions to retailers concerning the obscenity of certain publications with the nominal purpose of preventing youthful readers from being exposed to those publications. Finding that no procedures were provided before the publication was listed by the Commission and noting that the *effect* of listing a publication with the Commission was to completely suppress the subject publication, the Court held that the Rhode Island scheme violated the Fourteenth Amendment.

In *Heller v. New York,* 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973), the Court held that an adversary hearing was not required before authorities could seize a single copy of an allegedly obscene film as evidence in a criminal prosecution. However, the Court relied upon the fact that a threshold determination of obscenity had been made by a neutral and detached magistrate before the film was seized and the arrest of the theatre manager was made. In addition, the Court observed that a prompt post-seizure judicial resolution of the obscenity issue at the request of an interested party was vital to the constitutionality of the seizure.

Finally, in *Roaden v. Kentucky,* 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973), the Court held that seizure of a film which was being exhibited to the general public without authority of a constitutionally sufficient warrant created a form of prior restraint which rendered the seizure unreasonable under the Fourth Amendment to the United States Constitution.

[8] Taken together, *Bantam Books, Heller,* and *Roaden* [30] appear to stand for the proposition that before state officials may undertake a *series* of warrantless arrests which generate reasonably foreseeable *effects* in terms of removing presumptively protected speech from the public eye, judicial intervention of some dimension is constitutionally required.

[9] Plaintiffs argue that a full blown adversary hearing is required before an arrest under Ga.Code § 26–2101 may be made because the limited life span of the instant publications renders virtually any prior restraint a final restraint. *Cf. United States v. Thirty Seven Photographs,* 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971); *Teitel Film Corp. v. Cusack,* 390 U.S. 139, 88 S.Ct. 754, 19 L.Ed.2d 966 (1968). We are initially of the opinion that such an adversary hearing would unduly impede the valid functions of law enforcement officials by requiring them to in effect conduct a "mini-trial" upon the merits before being allowed to arrest a party who arguably has been apprehended in the act of violating Ga.Code § 26–2101. However, we are not called upon to make this decision because it is not entirely clear that a speedy post-arrest adversary hearing upon the question of obscenity would have been inadequate to vindicate plaintiff's rights. *Heller v. New York, supra.* Rather, we conclude simply that defendant did not comport with the certain *minimum* constitutional requirement of obtaining a warrant from a neutral and detached magistrate based upon a threshold determination of obscenity before making a *series* of ar-

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[30] Certainly *Roaden's* Fourth Amendment underpinnings make it distinguishable from the instant action. Nevertheless, the very heart of plaintiffs' argument is found in the notion that the series of arrests made by the defendant had the *effect* of constructively seizing subject publications without a warrant.

rests, the effect of which was to create a system of prior restraint with respect to plaintiffs' publications. Moreover, we are not persuaded that the harm to defendant will outweight the harm to plaintiff or that the public interest will be harmed by granting plaintiffs' certain carefully limited injunctive relief. *See Morgan v. Fletcher*, 518 F.2d 236 (5th Cir. 1975). In this context it should be noted that we do not decide that Mr. McAuliffe's office may make no more arrests under Ga.Code § 26–2101 concerning subsequent issues of the subject publications. Rather, we decide only that if he chooses to do so he must follow the previously enunciated constitutional guidelines.

In sum, we conclude that the August issues of plaintiffs' magazines have been subjected to an informal system of prior restraint, *Bantam Books v. Sullivan, supra*, and that injunctive and declaratory relief directed against this system is appropriate.

However, to avoid any untoward interference with legitimate state interests we will limit the parameters of the injunctive relief awarded to the specific facts of this action. Only in the area of declaratory relief should this opinion be construed so as to provide somewhat broader guidelines which will henceforth circumscribe the authority of the solicitor's office to make wholesale arrests, the effect of which is to put in place an informal system of prior restraint. Accordingly, without expressing any opinion as to the number of arrests which may constitute a prior restraint, we hereby DECLARE that defendant McAuliffe's enforcement activities under color of Ga.Code § 26–2101, consisting of numerous and harassing arrests with or without a warrant prior to a final adjudication upon the issue of obscenity *vel non* at an adversary hearing constitutes a prior restraint violative of the First and

Fourteenth Amendments to the United States Constitution. Moreover, defendant McAuliffe is hereby PERMANENTLY ENJOINED from making further arrests under Ga.Code § 26–2101 for the sale of the August issues of plaintiffs' publications without first obtaining arrest warrants.[31]

OBSCENITY VEL NON

[10] "Penthouse" is the sole plaintiff which has chosen to address the obscenity issue head on and has prayed for a declaration that the August 1977 issue of "Penthouse" is not obscene. It is uncontested that "Penthouse" must be evaluated by the standard set out in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) and substantially parroted in Ga.Code § 26–2101.[32] Of course, every element of the foregoing test must be met before a publication may be adjudicated obscene. *Id.*

While this court initially had substantial reservations about acting as a trier of fact where the applicable yardstick is one calibrated in terms of "contemporary community standards", it appears that the Supreme Court and lesser federal courts have not differentiated obscenity from other substantive areas and have adhered to the usual parameters of the Seventh Amendment by holding that a judge may act as a finder of fact in civil proceedings involving obscenity. *Alexander v. Virginia*, 413 U.S. 836, 93 S.Ct. 2803, 37 L.Ed.2d 993 (1973); *Star v. Preller*, 375 F.Supp. 1093 (D.C.Md.1974), *affirmed*, 419 U.S. 956, 95 S.Ct. 217, 42 L.Ed.2d 173; *United Artists Corp. v. Har-*

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[31] While this court's jurisdiction over the instant publications is limited to a single issue thereof, *see Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1930), it is hoped that as Mr. Justice Harlan suggested in *Bantam Books v. Sullivan*, 372 U.S. 58, 76, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963), a word to the wise will be sufficient.

[32] *See* fn. 2, *supra*.

ris, 363 F.Supp. 857 (W.D.Okl.1973). Such a result seems particularly appropriate here where all the evidence and argument was directed to the third prong of *Miller* which does not speak of contemporary community standards but rather requires only a determination as to "whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value." *Id.* 413 U.S. at 24, 93 S.Ct. at 2615. Members of the Supreme Court have suggested that this prong of *Miller* is essentially a major check upon the jury function which must be reviewed with care. *See Jenkins v. Georgia*, 418 U.S. 153, 164, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974) (Brennan, Stewart and Marshall concurring); *see also Roaden v. Kentucky, supra.* As we have already stated, the arrest procedures which were employed by Mr. McAuliffe's staff were constitutionally deficient because they failed to provide for a threshold determination of obscenity by a neutral magistrate. However, "Penthouse" also made a convincing showing that defendant and his agents did not properly apply the *Miller* test by considering the work in question "as a whole." Rather, Mr. Brown, who made the sole arrest involving "Penthouse" testified upon deposition that he was an average to poor reader who "looked largely at the pictures" and that he examined three magazines concerning which arrests were made, including "Penthouse", for a total of five minutes before exercising the discretion with which he perceived himself to be vested by making a warrantless arrest for the sale of the subject publications. A more complete examination of the August 1977 issue of "Penthouse" is required before a decision may be made as to whether or not on balance "the work, taken as a whole, lacks serious literary, artistic, political or scientific value." *Miller v. California, supra*, 413 U.S. at 25, 93 S.Ct. at 2615.

Mr. Guccione, editor of "Penthouse", testified that he had received awards from Brandeis University as "Publisher of the Year" and from Columbia University School of Journalism. In addition, Mr. Guccione stated that he had been invited to speak before audiences at Harvard, Yale, Wharton School of Finance and the American Bar Association concerning his financial and journalistic efforts. Moreover, Mr. Guccione testified that "Penthouse" often included articles by Harrison Salsburg, Nicholas Von Hoffman, Philip Roth, Norman Mailer and Tad Szulc, and that the August, 1977 issue of "Penthouse" was "representative." Mr. Guccione was particularly proud of the article entitled "The Spy Who Came in From the Newsroom" which revealed for the first time in print that Copley Press had twenty-three intelligence agents masquerading as reporters on its payroll.

In addition, the August, 1977 issue of "Penthouse" contains a number of articles of significant literary value including: (1) The Strange Case of the Missing Special Prosecutor; (2) a potpourri section containing "The Politician as Magician," "Vietnam on the Boards", film reviews, book reviews, and movie reviews; (3) "The Blue Jeaning of Eastern Europe", a piece concerning the westernization of Eastern European Youth; (4) "Is Man Born to Kill", a "New Look at Evil", an article about man's innate propensity for violence; (5) "The Vietnam Veterans Adviser"; (6) "Scoring Your Smarts"; (7) "White On", an article about light liquors; (8) "The Clean Machine", a review of the new Toyota Corolla liftback; and (9) "Winning Through Eccentricity" a view of how to progress up through the organizational hierarchy. While there are sections of "Penthouse" which exhibit less literary value and taste, we believe that on balance it cannot be said that the August, 1977 issue of "Penthouse", "taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* at 25, 93 S.Ct. at 2615. Any conflict which may potentially exist between our view of the August 1977 issue of "Penthouse" and that of a jury in a state criminal proceeding is one which is traceable solely to the multitude of fact finders provided for under *Miller v. California, supra.* However, since prosecution of Mr. Poss in state court for sale of the August, 1977 issue of "Penthouse" evidently has been declined, no conflict should in fact exist. Accordingly, it is hereby DECLARED that the August, 1977 issue of "Penthouse" magazine is not obscene within the meaning of *Miller v. California, supra,* and Ga.Code § 26–2101.

IT IS SO ORDERED.

APPENDIX C

(PENTHOUSE II, 454 F. SUPP. 289)

PENTHOUSE INTERNATIONAL, LTD.
v.
HINSON McAULIFFE.
PLAYBOY ENTERPRISES, INC.
v.
HINSON McAULIFFE.
PLAYBOY PUBLICATIONS, INC.
v.
HINSON McAULIFFE.

Civ. A. Nos. 77-1974A, 77-1998A and 77-1999A.

United States District Court,
N. D. Georgia,
Atlanta Division.

July 7, 1978.

Magazine publishers brought actions for declaratory and preliminary as well as permanent injunctive relief with respect to assertedly unconstitutional procedures followed by county solicitor's office in commencing criminal proceedings against the publishers for alleged violations of the Georgia obscenity law. Additionally, each publisher sought a declaration that several monthly issues of their respective publications were not obscene. The District Court, Richard C. Freeman, J., held that: (1) the publishers had standing to pursue the actions; (2) the exception to the *Younger* abstention doctrine for circumstances wherein state authorities had not yet commenced criminal prosecution was inapplicable to the magazine issues involved in the arrest of a magazine retailer; (3) even if the publishers had established such bad-faith harassment or exceptional circumstances as to warrant federal injunctive relief, the requested relief of an adversary hearing prior to any arrest was inappropriate; (4) evidence was insufficient to establish such bad-faith harassment or clearly meritless prosecution on the part of the prosecuting authorities as to warrant enjoining the Georgia criminal proceedings; (5) where a case or controversy existed concerning certain issues with respect to which criminal prosecution had been threatened, the "temporal" post-act, preprosecution exception to the *Younger* abstention doctrine was applicable; (6) where the magazines with respect to which such a justiciable controvery existed, when each was taken as a whole, did not encourage a shameful or morbid interest in sex and contained material having serious literary, artistic, political or scientific value, the magazines were not obscene, and (7) the county solicitor was required to apply the Georgia obscenity statute so as to consider magazines and other printed material as a whole.

Ordered in accordance with opinion.

1. Federal Civil Procedure 1991

In actions for declaratory and injunctive relief concerning the consequences of the arrest of a magazine retailer and the issuance of accusations against corporate and individual publishers of publications sold by the retailer, allegations concerning the temporal perishability and limited life span of the subject monthly publications warranted federal district court in exercising its discretion and advancing trial on the merits while consolidating trial with preliminary aspects. Fed.Rules Civ.Proc. rule 65(a)(2), 28 U.S.C.A.

2. Declaratory Judgment 300

Where gravamen of publishers' contention was that magazine retailer's arrest had a constitutionally impermissible effect on the sale and distribution of the publishers' magazines, it was clear that the publishers, as financially aggrieved parties having the resources to vindicate arguably infringed rights of the public and of persons in the chain of distribution, had a concrete interest in litigating suits for declaratory and injunctive relief with respect to assertedly unconstitutional procedures used to enforce Georgia obscenity statute; therefore, publishers had adequate standing to pursue the suits. Code Ga. § 26–2101; U.S.C.A.Const. Amends. 1, 14.

3. Injunction 85(1)

While, under the proper circumstances, a federal court may enjoin the enforcement of a state statute on constitutional grounds, such intervention must be carefully limited in the interests of comity and federalism.

4. Courts 508(7)

Because the state and its courts have a peculiarly strong interest in enforcement of their criminal laws, circumstances under which federal intervention in a state criminal prosecution is permitted are very narrow.

5. Courts 508(7)

Federal intervention in a state criminal prosecution is permitted in a limited time frame after there is a case or controversy because the arguably illegal act has been committed but before state authorities have exercised innate powers by commencing a criminal prosecution.

6. Courts 508(7)

Where Georgia authorities had already chosen to exercise their law enforcement powers by bringing criminal proceedings against magazine publishers as well as against local retailers of assertedly obscene magazines, the "temporal" exception to the *Younger* abstention doctrine which permits federal intervention in state criminal prosecution if state authorities have not yet exercised their powers by commencing a criminal prosecution was inapplicable.

7. Courts 508(7)

Contention of magazine publishers that, by issuing accusations with plaintiffs' assertedly nonobscene publications "sandwiched" between "hard core" publications in a single count, Georgia authorities acted in bad faith or were engaging in such harassment as to warrant federal intervention was unsupportable where, while such conduct might be persuasive on the bad-faith issue in the abstract or under different circumstances, the magazine publishers could be prosecuted only for purveying the magazines which they published and, therefore, no "hard core" publications of other publishers could distract the state court jury's attention from the alleged obscenity of publishers' magazines. Code Ga. § 26–2101; U.S.C.A.Const. Amends. 1, 14.

8. Courts 508(7)

State courts are presumed competent to deal with the same federal constitutional questions that may be presented in federal court and it is assumed that constitutional rights can normally be vindicated in state criminal proceedings.

9. Courts 508(7)

Fact that accusations issued in Georgia obscenity prosecution of magazine retailers "sandwiched" plaintiffs' publications between "hard core" publications in a single count did not preclude the plaintiffs, who were publishers, from vindicating their federal constitutional rights in their own state court actions and, therefore, did not bring the magazine publishers' suit for declaratory and injunctive relief within the exception to the *Younger* abstention doctrine for cases wherein state authorities are engaged in bad-faith harassment. Code Ga. § 26–2101; U.S.C.A. Const. Amends. 1, 14.

10. Courts 508(7)

Allegations that county solicitor failed to adequately train and supervise his subordinates and engaged in "judge shopping" in connection with Georgia obscenity prosecution were strictly relevant to magazine publishers' claims that Georgia prosecution manifested such bad faith as to warrant federal intervention only if the state court judge failed to follow normal criminal practice and the mandate of prior federal district court order; if the state court judge followed the proper standards and warrant procedures, the fact that he was singled out for warrant submission or that the county solicitor's subordinates were not adequately versed on the finer points of obscenity law was essentially irrelevant in that neutral and detached magistrate would have been interposed between county solicitor and magazine publishers. Code Ga. § 26–2101; U.S.C.A.Const. Amends. 1, 14.

11. Evidence 82

It is presumed with good legal reason that all judges know the law and, for practical reasons, that no judge would appreciate being viewed over a period of time as a "warrant doormat" for any prosecutor.

12. Courts 508(7)

Despite credible evidence that particular Georgia state court judge was sole judge to whom county prosecuting authorities tendered warrant applications, arguably because that judge's views on obscenity were more congruent with those of the county prosecutors than were the views of the other judges, and that two of the investigators in the county solicitor's office had an inadequate understanding of the prevailing obscenity standards, in absence of any indication that the prosecuting attorney's agents had harassed local magazine retailers or that the county prosecutors had publicly threatened the retailers or undertaken or contemplated any series of arrests, circumstances did not establish such bad-faith harassment on the part of the county authorities as to bring situation within exception to *Younger* abstention doctrine and warrant federal intervention in Georgia obscenity prosecution. Code Ga. § 26–2101; U.S.C.A.Const. Amends. 1, 14.

13. Arrest 63.1

Where, among other things, a speedy trial is available in state court, there is no requirement that state authorities hold a full-blown adversary hearing on obscenity before an arrest can be made for alleged violation of a state obscenity statute. U.S.C.A.Const. Amends. 1, 14.

14. Courts 508(1)

A federal plaintiff may not bypass the opportunity for a state hearing and then complain of its absence in federal court.

15. Courts 508(7)

Even if magazine publishers had shown bad-faith harassment or exceptional circumstances surrounding Georgia obscenity prosecution sufficient to warrant federal injunctive relief, the requested relief of an adversary hearing prior to arrest was inappropriate where, among other things, a speedy trial was available in state court. Code Ga. § 26–2101; U.S.C.A.Const. Amends. 1, 14.

16. Courts 508(7)

Magazine publishers did not make a sufficient showing of bad-faith harassment or clearly meritless prosecution to warrant federal court intervention to enjoin Georgia criminal obscenity proceedings. Code Ga. § 26–2101; U.S.C.A.Const. Amends. 1, 14.

17. Injunction 189

Because each issue of an assertedly obscene magazine presents a discrete obscenity question, prospective injunctive relief as to the obscenity of publications is inappropriate.

18. Courts 508(7)
Declaratory Judgment 84

Where Georgia authorities had threatened prosecution with respect to January issues of certain publications, a case or controversy existed with respect to the January issues and the "temporal" postact, preprosecution exception to the *Younger* abstention doctrine was applicable; however, prior restraint issue was not properly presented by the January issues where the magazines were actually vended in the county pursuant to an agreement with the county solicitor and the allegedly unconstitutional procedures which the publishers attempted to attack in suit for injunctive and declaratory relief were never applied to their January issues.

19. Action 6

The judicially carved exception to the mootness doctrine which applies when a claim is capable of repetition yet evades review is typically employed when the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration and there is a reasonable expectation that some complaining party will be subjected to the same action again.

20. Declaratory Judgment 84

Evidence that the "life" of an issue of one of plaintiffs' magazines was relatively short, approximately one month, and that the issue of the alleged obscenity of the publications might well arise again in the district warranted conclusion that the arguable obscenity of certain issues of plaintiffs' magazines with respect to which prosecution was threatened presented a live, justiciable controversy. Code Ga. § 26–2101; U.S.C.A.Const. Amends. 1, 14.

21. Obscenity 5

Every element of the test delineated in *Miller v. California* must be met before publication may be adjudicated obscene. U.S.C.A.Const. Amends. 1, 14.

22. Obscenity 5

Phrase "taken as a whole" in portion of obscenity standard pursuant to which a work can be obscene only if it lacks serious literary, artistic, political or scientific value when it is "taken as a whole" appears designed to eliminate segmented review of a book or magazine when, on balance, the redeeming features of the work outweight any of its arguably obscene portions. U.S.C.A.Const. Amends. 1, 14.

See publication Words and Phrases for other judicial constructions and definitions.

23. Obscenity 5

Constitutional requirement that a work be "taken as a whole" in determining whether or not it is obscene does not permit a court to "take as a whole" discrete works within a magazine and judge them independently obscene. U.S.C.A.Const. Amends. 1, 14.

24. Obscenity 5

The "taken as a whole" standard of *Miller v. California* simply reflects the practical fact that an arguably obscene book or magazine is going to be published or banned as a discrete unit; it is practically impossible and legally impermissible for prosecuting authority to tiptoe through each and every assertedly obscene magazine, scissors in hand, and to excise those portions of a magazine that are thought to be obscene. U.S.C.A.Const. Amends. 1, 14.

25. Obscenity 5

A magazine is a "whole" for purposes of obscenity standard pursuant to which the trier of fact must consider whether the work, taken as a "whole," lacks serious literary, artistic, political or scientific value; therefore, a magazine must be judged as such a "whole." U.S.C.A. Const. Amends. 1, 14.

See publication Words and Phrases for other judicial constructions and definitions.

26. Obscenity 5

Where assertedly obscene magazines, each taken as a whole, did not encourage a shameful or morbid as opposed to a healthy interest in sex and where the material in each magazine was not palpably offensive because it rarely depicted conduct or acts and the magazines had serious literary, artistic, political and scientific value by reason of articles on a variety of subjects, magazines were not obscene. U.S.C.A.Const. Amends. 1, 14.

27. Obscenity 5

Finding that assertedly obscene magazines had significant literary, artistic, political and scientific value precluded finding the magazines obscene, whatever other determinations were made. U.S.C.A.Const. Amends. 1, 14.

28. Obscenity 5

Any conflict between federal district court's view that certain magazines were not obscene and that of jury in state criminal proceeding was not necessarily irreconcilable but was rather traceable solely to the multitude of fact finders provided for under the prevailing United States Supreme Court obscenity guidelines. Code Ga. § 26–2101; U.S.C.A.Const. Amends. 1, 14.

29. Obscenity 5

County solicitor was required to apply the Georgia obscenity statute so as to consider magazines and other printed materials as a whole. Code Ga. § 26–2101; U.S. C.A.Const. Amends. 1, 14.

James L. Paul, Gambrell & Mobley, Atlanta, Ga., Norman Roy Grutman, Eaton, Van Winkel, Greenspoon & Grutman, New York City, for plaintiff in Civ. A. No. 77–1974A.

Warren C. Fortson, Smith, Cohen, Ringel, Kohler & Martin, Atlanta, Ga., Neil H. Adelman, Devoe, Shadur & Krupp, Chicago, Ill., for plaintiffs in Civ. A. Nos. 77–1998A, 77–1999A.

Leonard W. Rhodes, Asst. Sol. Gen., State Court of Fulton County, Atlanta, Ga., for defendant.

ORDER

RICHARD C. FREEMAN, District Judge.

[1] These are actions brought for declaratory and preliminary as well as permanent injunctive relief [1] concerning the consequences of the arrest of Atlanta magazine retailer Albert Battle and the issuance of accusations against the corporate and individual publishers of plaintiffs' respective publications.[2] In each instance, the Solicitor of Fulton County, Georgia, contended that the parties in question had violated the Georgia obscenity statute, Ga.Code § 26–2101 [3] by vending obscene material in Ful-

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[1] Because of the alleged temporal perishability and limited life span of plaintiffs' monthly publications, this court exercised its discretion under Fed. Rule 65(a)(2), Fed.R.Civ.P., and advanced the trial of this action upon the merits while consolidating it with the preliminary aspects of this action.

[2] Accusations have been issued by the Fulton County Solicitor's office against Robert Guccione and plaintiff Penthouse International, Ltd., the publishers of Penthouse Magazine, Daniel Filipacchi and plaintiff Playboy Publication, Inc., the copublisher and publisher of Oui Magazine, and Hugh Hefner and plaintiff Playboy Enterprises, Inc., the publishers of Playboy Magazine.

[3] Ga.Code § 26–2101 provides as follows:

> (a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word "knowing," as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter, and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. Provided, however, the character and reputation of the individual charged with an offense under this law, and if a commercial dissemination of obscene material is involved, the material character and reputation of the business establishment involved may be placed in evidence by the defendant on the question of intent to violate this law. Undeveloped photographs,

ton County, Georgia. The substantive federal claims which plaintiffs presently bring before this court arise under the First and Fourteenth Amendments to the United States Constitution as well as under 42 U.S.C.

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molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be required to make the obscenity patent or to disseminate it.

(b) Material is obscene if:

(1) to the average person, applying contemporary community standards, taken as a whole, it predominantly appeals to the prurient interest, that is a shameful or morbid interest in nudity, sex or excretion;

(2) the material taken as a whole, lacks serious literary, artistic, political or scientific value, and

(3) the material depicts or describes, in a patently offensive way, sexual conduct specifically defined in subparagraphs (i) through (v) below:

(i) acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;

(ii) acts of masturbation;

(iii) acts involving excretory functions or lewd exhibition of the genitals;

(iv) acts of bestiality or the fondling of sex organs of animals;

(v) sexual acts of flagellation, torture or other violence indicating a sadomasochistic sexual relationship;

(c) Additionally, any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this section.

(d) Material, not otherwise obscene, may be obscene under this section if the distribution thereof, or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(e) It is an affirmative defense under this section that dissemination of the material was restricted to:

(1) a person associated with an institution of higher learning, either as a member of the faculty or a matriculated student, teaching or pursuing a course of study related to such material; or

(2) a person whose receipt of such material was authorized in writing by a licensed medical practitioner or psychiatrist.

A person convicted of distributing obscene material shall be punished as for a misdemeanor of a high and aggravated nature.

§ 1983. The jurisdiction of this court is properly predicated upon 28 U.S.C. § 1331 and 1343(3).

Each plaintiff's complaint raises two similar if not identical claims. First, each plaintiff seeks declaratory and injunctive relief with respect to what it contends are unconstitutional procedures followed by the Solicitor's office which have resulted in the commencement of improper criminal proceedings against the publishers and in the imposition of a prior restraint against their publications. Second, each plaintiff seeks a declaration that several monthly issues of the respective publications are not obscene within the meaning of the constitutional standards enunciated in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), and subsequently codified in Ga. Code § 26–2101.[4] Before proceeding to the merits of plaintiffs' claims, a recapitulation of the history of litigation between these parties as well as the operative facts presently before this court is warranted.

In late July of last year, an action filed in this court by Penthouse International Ltd. and several other publishers not parties to the instant action against defendant

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[4] More specifically, plaintiffs seek: (1) a declaration that several of their monthly issues are not obscene; (2) a declaratory judgment that the Georgia obscenity statute may not be applied constitutionally to future issues of plaintiffs' magazines which have the same general editorial content as the December, 1977 through June 1978 issues; (3) a declaratory judgment that defendant's method of applying Ga. Code § 26–2101 is unconstitutional because it fails to consider the magazine as a whole; (4) a permanent injunction requiring a prior adversary hearing and a determination of obscenity before any arrest for the sale of one of plaintiffs' monthly issues may be made in the future; (5) a permanent injunction prohibiting defendant from going forward with the pending prosecutions against Battle, Guccione, Filipacchi and Hefner; and (6) and a permanent injunction requiring defendant to notify and not to object to plaintiffs' appearance in any post-arrest preliminary hearing concerning one of plaintiffs' future publications.

McAuliffe. *Penthouse International, Ltd., et al. v. McAuliffe,* 436 F.Supp. 1241 (N.D.Ga.1977) [hereinafter *"Penthouse I"*]. In that action, the federal plaintiffs argued that through a series of eight carefully timed arrests coupled with repeated threatening visits to retailers and threatening comments in the press, defendant avoided a binding adjudication among all of the allegedly injured parties concerning the obscenity *vel non* of the subject publications while erecting a system of prior restraint which effectively eliminated the availability of plaintiffs' publications in the Fulton County area. *Id.* at 1244. The evidence in that action clearly demonstrated that in each instance no arrest warrant based upon probable cause and issued by a neutral and detached magistrate, *see Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), was obtained before the arrest was made. Rather, the arresting officer himself made the determination that the subject material, which was presumptively protected by the First Amendment, *Cinema Classic Limited v. Burch,* 339 F.Supp. 43 (C.D.Cal.), *aff'd,* 409 U.S. 807, 93 S.Ct. 105, 34 L.Ed.2d 66 (1972), was obscene and therefore that the vendor could be arrested for committing the offense of vending obscene material in the presence of the officer. In our order of August 24, 1977, we agreed with plaintiffs that their magazines had been "constructively seized", *see Roaden v. Kentucky,* 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973), *Sokolic v. Ryan,* 304 F.Supp. 213 (S.D.Ga.1969); *Delta Book Distributors v. Cronvich, Inc.,* 304 F.Supp. 662 (E.D.La.1969) (three-judge court); *Cambist Films, Inc. v. State of Illinois,* 292 F.Supp. 185 (N.D.Ill.1968) [numerous arrests chilling further sales and creating a prior restraint], from the newsstand by the series of arrests effected without any threshold judicial intervention. Accordingly, we declared that defendant McAuliffe's enforcement activities under color of Ga. Code § 26-2101, consisting of numerous and harassing arrests with or without a warrant prior to a final adjudication upon the issue of obscenity *vel non* at an adversary hearing constituted a prior restraint violative of the First and Fourteenth Amendments to the United States Constitution, *Penthouse International, Ltd. v. McAuliffe, supra* at 1256. We also ruled that the August, 1977 issue of Penthouse magazine was not obscene within the meaning of *Miller v. California, supra* and Ga.Code § 26-2101, and permanently enjoined defendant from making further arrests for the sale of the August, 1977 issue of any of the subject publications without first obtaining arrest warrants. The stage was then set for the further theatrics which have given rise to this litigation.

On August 25, 1977, defendant McAuliffe telephoned J. Kirk Quillian, an attorney who represents Atlanta New Agency,[5] and informed Quillian that he considered the September, 1977 issue of Penthouse to be obscene. On August 26, 1977, at Mr. Quillian's suggestion, McAuliffe agreed to submit the subject magazine informally to Judge Daniel Duke of the State Court of Fulton County arguably in order to determine: (1) whether it was obscene or whether it could properly be distributed; and (2) whether its distribution would violate Judge Duke's probationary order entered with respect to Atlanta News Agency after its plea of *nolo contendere* to obscenity charges on August 23, 1977. Judge Duke advised Mr. McAuliffe and Mr. Quillian that, taken as a whole, he did not consider the September "Penthouse" to be obscene.

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[5] Atlanta News Agency is the Regional Distributor or Wholesaler who distributes to newsstands, book stores and other "retail customers" or retailers between 90 and 98% of all of the magazines so vended in Fulton County, Georgia. *See Penthouse International Ltd. v. McAuliffe,* 436 F.Supp. 1241 nn. 8, 19 (N.D.Ga.1977).

Thereafter, between December 8 and 13, 1977, Mr. Quillian and Mr. McAuliffe candidly discussed ways to expeditiously obtain a resolution of the obscenity issue with respect to publications vended by Atlanta News without subjecting Mr. Edward Elson, President of Atlanta News Agency, to further arrests.[6] Defendant McAuliffe indicated that he would give Quillian notice if he were about to arrest someone for the sale of a magazine known to be distributed by Atlanta News. In addition, Mr. McAuliffe and Quillian discussed a "stripped down" state court declaratory judgment procedure whereby an arguably obscene magazine could be taken to a Superior Court judge and if it was ruled obscene Atlanta News would not sell it. Conversely, if the judge ruled that it was not obscene, Mr. McAuliffe would not arrest for its sale. However, the parties could not agree on Mr. McAuliffe's suggestion that the procedure would entail no expert testimony and no appellate rights. In addition, Judge Sam Phillips McKenzie of the Fulton Superior Court advised the parties that there were no adequate procedures to deal with the contemplated plan and that he did not believe that the judges of that court would look favorably upon an attempt to create some. Accordingly, no procedure was ever agreed upon.[7]

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[6] Mr. Elson had been arrested in July, 1977 on eight counts of vending obscene material. At the hearing of this action, he testified that he was embarrassed both professionally and socially by this arrest and that he would do "anything" to avoid being arrested again. Unfortunately, the "notice system" *infra* which was devised by Quillian and McAuliffe was patently unconstitutional because it bartered away the rights of the publishers, *see Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967); *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971); and the public, *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972) in favor of Mr. Elson's peace of mind.

On November 23, 1977, Mr. Leonard Rhodes from Mr. McAuliffe's office took copies of several magazines purchased by investigator Hartley to the chambers of Chief Judge Camp of the State Court of Fulton County. On the same day, Mr. McAuliffe's office telephoned Mr. Quillian and told him that a purchase had been made of the December Penthouse which Mr. McAuliffe considered to be obscene. Quillian was pledged to keep this information confidential.[8] On November 30, six John Doe arrest warrants were issued in connection with the sale of "Chic", "Playboy", "Oui", "Raw Lust", "Hustler" and "Penthouse" and Albert Battle was arrested. Quillian was given notice of the arrests. Battle's attorney waived a preliminary hearing on December 1, 1977. The next day Leonard Rhodes notified Quillian of the waiver and that Mr. McAuliffe's office considered the waiver to be an initial determination that the magazine was obscene. It is unclear when during the period the accusations were issued against the instant plaintiffs and Guccione, Filipacchi and Hefner. In any event, Quillian told Elson of the conversation and Elson ordered Atlanta News to immediately "pick up" from their retailers all of the December issues of the subject publications. During the period of December 6, through December 8, 1977, defendant McAuliffe and Mr. Rhodes had conversations with Quillian concerning the arguable obscenity of the January issues of plaintiff's publications. However, on December 9, 1977, this action was filed and defendant McAuliffe agreed to make no further arrests until the issues herein presented were decided.

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[7] As we observed upon the trial of this action, the proposed system was merely an abortive attempt to pare down due process safeguards and decide the obscenity *vel non* of plaintiffs' publications without plaintiffs' presence.

[8] It is arguable, of course, that Mr. McAuliffe was merely endeavoring to comply with *Penthouse I* by keeping "threatening" comments out of the press.

Although expedited discovery was granted and this court remained ready to hear this action at several junctures, the parties could not resolve pre-trial disputes until early May. The action was then heard on May 17 and 18, 1978, and post-trial briefs were filed, the last of which was received by this court on June 26, 1978. The issues presented finally appear ripe for adjudication.

STANDING

[2] Defendant has argued that plaintiffs do not have standing to complain about the prosecution of Albert Battle, apparently because such a right is personal to Mr. Battle. This argument misconstrues plaintiffs' position. The gravamen of the publishers' contentions is that Battle's arrest had a constitutionally impermissible *effect* upon the sale and distribution of their magazines. Without expressing any view at this juncture as to the merits of this claim, it is clear that plaintiffs have a concrete interest in litigating this action, *see Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), because they "are the most financially aggrieved parties and they alone have the resources to vindicate the arguably infringed rights of the public and those persons in the chain of distribution." *Penthouse International, Ltd. v. McAuliffe, supra* at 1246; *Bantam Books v. Sullivan,* 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963); *Grandco Corp. v. Rochford,* 536 F.2d 197 (7th Cir. 1976); *Allied Artists Picture Corp. v. Alford,* 410 F.Supp. 1348 (W.D.Tenn. 1976). Therefore, we conclude once more that plaintiffs have adequate standing to pursue this action. Accordingly, we must proceed to the troublesome and intractable abstention question.

YOUNGER v. HARRIS AND ITS PROGENY

[3, 4] As in *Penthouse I*, defendant has vigorously contended that the instant proceeding for injunctive and declaratory relief must be dismissed due to its potential for interference with ongoing state criminal prosecutions. While it is clear that under the proper circumstances a federal court may enjoin the enforcement of a state statute on constitutional grounds, *Ex Parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), it is equally clear that such intervention must be carefully limited in the interests of comity and federalism. *Younger v. Harris,* 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). The teaching of *Younger* is, at least in part, that the state and its courts have a peculiarly strong interest in the enforcement of their criminal laws. Accordingly, the circumstances under which federal intervention is permitted are narrow and evidently only two in number.

[5, 6] The first limitation upon *Younger* permits federal intervention in the limited time frame after there is a case or controversy because the arguably illegal act has been committed but before state authorities have exercised their innate powers by commencing a criminal prosecution. *See Steffel v. Thompson,* 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974) [plaintiff's handbilling companion was arrested and plaintiff was threatened with arrest before bringing a federal declaratory suit]; *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975) [one bar owner who reopened after being closed under a local ordinance was immediately arrested and two other similarly situated owners brought a federal declaratory suit]. This "temporal" exception does not apply to the magazine issues involved in Mr. Battle's arrest as it did in *Penthouse I* because in this instance, state authorities have already chosen to exercise their law enforcement powers by bringing criminal proceedings against the plaintiff publishers as well as the local retailers. Accordingly, plaintiffs are relegated to proving their compliance with the second *Younger* exception as a precondition to proceeding to the merits of their prior restraint arguments.

In *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965), the federal plaintiffs were successful in obtaining an injunction against their prosecution in state court for violation of the Louisiana Subversive Activities and Communist Control Law. Noting that the statutes were unconstitutionally overbroad upon their face, the Supreme Court stated that federal intervention was warranted where state authorities were engaged in "bad faith-harassment" or where other "exceptional circumstances" existed. *See Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) [federal intervention proper where statute was facially unconstitutional and the federal plaintiff was being arrested virtually daily for the same crime without taking any additional affirmative action]. Plaintiffs have enumerated a plethora of defendant's actions which they contend constitute bad faith and harassment, the most important of which include: (1) carefully "structuring" the criminal proceedings in effect to avoid an adjudication of the obscenity of plaintiffs' publications; (2) defendant McAuliffe's failure adequately to supervise and direct his subordinates; (3) "judge shopping"; and (4) that Mr. McAuliffe has incorrectly and unconstitutionally interpreted the "taken as a whole" standard articulated in *Miller v. California*, *supra* and Ga.Code § 26-2101. These contentions will be addressed *seriatim*.

[7] Plaintiff's first contention is that by issuing accusations with plaintiffs' publications "sandwiched" between "hard core" publications such as "Raw Lust" and "Chic" in a single count, it is possible that the criminal charges can be tried and a guilty verdict obtained based solely upon the obscenity of the hard core publications. The evidence given by Mr. Michael Clutter, Mr. Battle's attorney, suggested that he wished to keep publications like "Playboy", "Oui" and "Penthouse" in a criminal charge because of their palliative effect upon a jury and that he and most other local criminal counsel typically waived a preliminary hearing in order to avoid dismissal of the charges as to those publications. In addition, a paralegal employed by one plaintiff examined Fulton County Court records and found that the single count procedure followed by defendant McAuliffe was mainly peculiar to plaintiffs' cases. Defendant McAuliffe in turn testified that under Georgia law the trial judge had the discretion to sever publications within a single count for the purpose of determining guilt or innocence as to the sale of each publication and that it is arguable that only one transaction is involved in the simultaneous sale of several purportedly obscene magazines so that only one accusation is permissible for each multi-magazine sale.

[8, 9] While plaintiffs' evidence might be persuasive on the bad faith issue in the abstract or under different circumstances, plaintiffs have completely neglected the fact that they are parties to state criminal proceedings where the obscenity *vel non* of the same issues of plaintiffs' publication involved in Mr. Battle's prosecution may be litigated. Moreover, since plaintiffs may only be prosecuted for purveying the magazines which they publish, no "hard core" publications would distract a state court jury's attention from the alleged obscenity *vel non* of

"Playboy", "Oui" or "Penthouse." Likewise, if Judge Camp failed to follow the proper procedures in issuing a warrant, his failure can be raised by challenging the adequacy of the warrant in state court. State courts are presumed competent to deal with the same federal constitutional questions which may be presented here, *Doran v. Salem Inn, Inc., supra*, and it is assumed that those rights can normally be vindicated in criminal proceedings. *Younger v. Harris, supra; Grandco Corp. v. Rochford, supra*. Moreover, if plantiffs have deliberately bypassed an available adequate state remedy to litigate here, it is arguable that their complaint lacks equity or irreparable injury sufficient to warrant federal injunctive relief. *cf. Milky Way Productions v. Leary*, 305 F.Supp. 288 (S.D.N.Y.1969) (three-judge court), *aff'd*, 397 U.S. 98, 90 S.Ct. 817, 25 L.Ed.2d 78 (1970); *Universal Amusement Co., Inc. v. Vance*, 559 F.2d 1286 (5th Cir. 1977). Independent of this notion, however, we believe that the form of the state court charge as to Mr. Battle has little relationship to the ability of plaintiffs to vindicate their federal constitutional rights in their own state court actions. Accordingly, we will proceed to consider plaintiffs' other allegations of bad faith.

[10] Plaintiffs' next two contentions [9] concerning failure to train and supervise subordinates and judge shopping are strictly relevant only if the state court judge failed to follow normal criminal practice and the mandate of our order of August 24, 1977. Put another way, if Judge Camp followed the proper standards and warrant procedures, the fact that he was singled out for warrant submission or that Mr. McAuliffe's subordinates were not adequately

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[9] Plaintiffs' final contention is more appropriately considered during a discussion of the obscenity *vel non* issue *infra*.

versed on the finer points of obscenity law is essentially irrelevant because a "neutral and detached magistrate" not engaged in the competitive business of law enforcement, *Coolidge v. New Hampshire, supra*, will have been interposed between Mr. McAuliffe and plaintiffs.

[11] Unfortunately, the record as to the standards and mode of scrutiny of the subject publications employed by Judge Camp in issuing the subject warrants is entirely unclear. In an affidavit apparently executed at the suggestion of plaintiffs, Judge Camp indicated that he perused all six magazines for about thirty-five minutes, looking mainly at the pictures, and spent little time reading the lengthy articles. In a subsequently executed affidavit, Judge Camp revised his estimates and characterized his review as more plenary and thorough. Accordingly, a factual dispute as to the adequacy of Judge Camp's review remains even after trial of this action.[10] Although either party could have called Judge Camp to testify in person, neither party elected to do so. Because *inter alia* the nature of Judge Camp's review is not entirely clear, a brief summary of the judge shopping and supervision evidence is warranted.

[12] Credible evidence showed that Judge Camp was the sole judge to whom defendant tendered warrant applications, arguably because his views concerning obscenity are more congruent with those of defendant McAuliffe than are the views of the other judges in the State Court of Fulton County.[11] In addition, the evidence showed that two of the investigators in Mr. McAuliffe's office had an inadequate understanding of the *Miller* test articulated in Ga.Code § 26-2101. John E. Segars, who is a law school graduate, testified that he really did not think about what any of the operational language in the statute meant upon purchasing several issues of the subject magazines. Likewise, James D. Hartley of Mr. McAuliffe's office stated that he simply picked up the specified magazines and delivered them to superiors who tendered them to Judge Camp.

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[10] It is of course presumed with good legal reason that all judges know the law and for practical reasons that no judge would appreciate being viewed over a period of time as a "warrant doormat" for any governmental prosecutor.

[11] For instance, Judge Duke evidently refused a warrant application for an issue of Penthouse upon which Judge Camp was prepared issue a warrant.

Defendant McAuliffe argued in turn that the selection of Judge Camp was based solely upon his availability due to his position of Chief Judge and the lighter case load attendant thereto. In addition, Mr. McAuliffe stated that his investigators were given verbal instructions and were required to carry a synopsis of this court's order of August 24, 1977 with them at all times.

Even if we accept the views of the foregoing evidence in a light most favorable to plantiffs, it is not clear that bad faith-harassment has been made out. Bad faith-harassment has most often been found where there is a facially unconstitutional statute, *Dombrowski v. Pfister, supra,* or where there have been repeated prosecutions none of which have resulted in a conviction, *Krahm v. Graham,* 461 F.2d 703 (9th Cir. 1972) [nearly 100 criminal charges still pending where eleven cases had been tried and none had resulted in conviction]; *Granco Corp. v. Rochford, supra,* [intervention improper where some of 100 prosecutions had resulted in convictions]. Similarly, intervention has been countenanced where it is beyond reproach that there was no conduct arguably within the ambit of the statute or the prosecution had absolutely no hope of obtaining a valid conviction. *Perez v. Ledesma,*

401 U.S. 82, 91 S.Ct. 674, 27 L.Ed.2d 701 (1970). Because there is initially no "track record" in the State Court of Fulton County concerning the obscenity of the subject magazines, it is difficult if not impossible to say that further attempts at this juncture to prosecute plaintiffs constitute bad faith-harassment.

Perhaps more dramatic is what the evidence does not show. There is no indication as there was in August that Mr. McAuliffe's agents have repeatedly visited plaintiffs' local retailers. In addition, there is no evidence that Mr. McAuliffe has "rattled his saber" in the newspapers or that any series of arrests has been undertaken or contemplated. In essence, then, there is no evidence of violation of this court's previous order and little evidence of "bad faith-harassment." However, it is arguable that there are "exceptional circumstances" warranting federal injunctive relief including: (1) the continuing nature of this controversy; (2) the possibility of further arrests; and (3) the unique marketing situation in Fulton County, Georgia. The last of these bears some elaboration.

Atlanta News Agency services approximately 850 to 900 of the 950 retail magazine outlets in Fulton County, Georgia with about 2,000 different magazines. *Penthouse International Ltd. v. McAuliffe; supra* at 1250. In performing this service, Atlanta News employs 275 people and 90 trucks as well as computer facilities. *Id.* at 1245 n.8. Mr. Elson, President of Atlanta News, testified at the hearing of this action that his organization controls approximately 98% of the retail newsstand magazine market in Atlanta. In fact, it has come to the attention of this court, although it was never entirely explained during trial, that Atlanta News has entered into a consent decree with respect to its future market conduct in

Fulton County, Georgia and several other areas. Therefore, the unusual marketing situation in Fulton County hopefully will be of limited duration. Nevertheless, the effect of Mr. Elson's control over the Atlanta market has been to preclude the entry into the market of "marginal risk takers" who might be willing to vend the subject magazines in the face of an arguable one in 900 chance of being arrested. Instead, the evidence demonstrated that when the slightest possibility of an arrest emerges, Mr. Elson simply removes all of the subject magazines from the stands, effectively eliminating them from the Fulton County market.

Plaintiffs have once more argued in the abstract that they and Mr. Elson should not be denied federal injunctive relief and thereby be placed "between the Scylla of intentionally flouting state law and the Charybdis of forgoing what [they] believe to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel v. Thompson, supra* 415 U.S. at 462, 94 S.Ct. at 1217. However, plaintiffs neglect to note that they are already enmeshed in such a proceeding. Moreover, defendant has argued with equal vigor that the risk of a single arrest is one which plaintiffs and Mr. Elson should bear. *Younger v. Harris, supra.* Both abstract arguments do little to resolve the instant dispute.

[13-16] However, assuming *arguendo* that the showing of "bad faith-harassment" and "exceptional circumstances" made by plaintiffs were sufficient to permit plaintiffs to proceed to the merits of the prior restraint issue, we still would be compelled to rule that no relief was appropriate because there is no defect of a constitutional dimension in the procedure delineated by our order of August 24, 1977. The sole discernible challenge leveled by

plaintiffs is that defendant should be required to hold a full blown adversary hearing on the obscenity *vel non* issue at which at least a preponderance of the evidence standard would be employed before an arrest could be made as to any of plaintiffs' publications. This proposal has been uniformly rejected by the courts. In *Milky Way Productions v. Leary, supra*, publishers of weekly and biweekly publications argued that a prior adversary hearing was necessary before they could be arrested because of the chilling effect upon others of such an arrest. Judge Frankel, writing for the three-judge panel, held *inter alia:* (1) that the "chilling effect" of a prior adversary hearing could be as great or greater than that of an arrest; (2) that such a hearing procedure could be used indiscriminately to increase First Amendment barriers; and (3) that the onset of the criminal process provided the state court defendants with additional procedural safeguards which were constitutionally sufficient to protect the federal plaintiffs' rights. Other courts have reasoned similarly, *Golden Eagle v. Johnson*, 493 F.2d 1179 (9th Cir. 1974); or held *inter alia* that prior adversary hearings normally are an unnecessary and overbroad impingement upon the ordinary methods of initiating criminal proceedings. *Mouldings, Inc. v. Potter*, 465 F.2d 1101 (5th Cir. 1972); *Krahm v. Graham, supra.* Accordingly, we believe that the requirement of a prior adversary hearing is not warranted where *inter alia* a speedy trial is available in state court. Rather than avail themselves of such a speedy trial specifically offered by defendant McAuliffe, plaintiffs resisted extradition and came to this court complaining of an alleged lack of an adequate forum. A federal plaintiff may not bypass the opportunity for a hearing and then complain of its absence. *Universal Amusement Co. v. Vance, supra.* Mr. Grutman, counsel for Penthouse, stood before this court in Penthouse I and in his most dulcet tones clearly stated that he and Mr. Guccione would travel anywhere at any time to vindicate the worth of their magazine. Evidently when the travel entails a criminal prosecution rather than a civil action, an election which the state is entitled to make, *Younger v. Harris, supra,* Mr. Guccione has more difficulty obtaining reservations. In any event, we believe that the requirement of a prior adversary hearing has been rejected in parallel cases and is not warranted in this action.[12] Accordingly, we conclude that even if bad faith-harassment or exceptional circumstances sufficient to warrant federal injunctive relief had been shown, the requested relief of an adversary hearing is inappropriate.[13] Moreover, with respect to enjoining the criminal proceedings in state court, we conclude that an insufficient showing of bad faith-harassment or clearly meritless prosecution has been made. *See Krahm v. Graham, supra; Grandco Corp. v. Rochford, supra; Perez v. Ledesma, supra.* If a defect in the manner in which the warrants were *in fact* issued exists, that contention should be raised as a defense in the criminal prosecution. The evidence presented on that question here was just inconclusive. However, our conclusion simply pretermits consideration of any matters concerning the December issues of plaintiffs' magazines. It does not necessarily preclude the consideration of the obscenity *vel non* question with respect to subsequent issues of plantiffs' magazines.

OBSCENITY VEL NON

[17, 18] With respect to the January issue of plaintiffs' publications, there was testimony given *inter alia* by Mr. Quillian that notice of their probable obscenity had been given by Mr. Rhodes in Mr. McAuliffe's office and that true to form a prosecution probably would have proceeded had not this action intervened.[14] In the context of plaintiffs' January issues then, a case or controversy exists, *Baker v. Carr, supra,* and the "temporal" post-act, pre-prosecution exception to *Younger* applies, *see Steffel v. Thompson, supra; Doran v. Salem Inn, Inc., supra.* No untoward interference with the state court proceedings could result because no January issue of plaintiffs' publications is involved there. However, the prior restraint issue is not properly presented here by the January issues because the magazines were actually vended in Fulton County pursuant to the agreement with Mr. McAuliffe and the allegedly unconstitutional procedures which plaintiffs attempted to attack were never applied to plaintiffs' January issues. *Cf. Midway Youth Football Ladies Auxiliary, Inc. v. Strickland,* 449 F.Supp. 418 (N.D.Ga.1978) (Freeman, J.); *Warth v. Seldin,* 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *Rizzo v. Goode,* 423 U.S. 362, 96 S.Ct. 598, 46 L.Ed.2d 561 (1976). Therefore, solely the obscenity *vel non* issue is left for decision. However, in order to reach that conclusion we must determine that the sale of the January issue of the subject magazines does not posit a moot question.

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[12] To the extent that a contrary result may be suggested by *Universal Amusement Co. v. Vance,* 559 F.2d 1286 (5th Cir. 1977), under Texas and federal law, when a "seizure" occurs, we find that there is insufficient evidence of any "seizure" in this action. *See* note 13 *infra.*

[13] Plaintiffs have also moved this court to devise guidelines for the future which will prevent the recurring nature of this litigation. The obscenity *vel non* section of this order should help create some meeting of the minds upon that question. With respect to the arguable "prior restraint" question, plaintiffs and Mr. Elson should look for a remedy *inter se* rather than for a judicial remedy when, as here, it is arguable that their claim is the product of collusion, *e. g.,* plaintiffs' resistance to available state court procedures and their institution of this action coupled with Elson's removal of the subject magazines. *Cf. Septum, Inc. v. Robert E. Keller,* C.A. No. 77-1476A (N.D. Ga. Sept. 16, 1977) (O'Kelley, J.). Although this situation may not be collusive in the strict sense of being agreed upon between plaintiffs and defendant, it nevertheless has the odor of contrivance about it. *See* note 5 *supra.*

[14] No issue after January, 1978 will be examined because no threat of prosecution sufficient to create a case or controversy has been made as to those issues. Of course plaintiffs bear the burden as well as the benefit of the teaching of *Near v. Minnesota,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1930), that each issue of their magazines presents a discrete obscenity question. For that same reason, prospective injunctive relief as to the obscenity *vel non* of plaintiffs publications is inappropriate.

[**19-21**] In *Penthouse I* we noted that the power of this court was limited by Article III of the United States Constitution to justiciable or live controversies, *DeFunis v. Odegaard,* 416 U.S. 312, 94 S.Ct. 1704, 40 L.Ed.2d 164 (1974); *Sosna v. State of Iowa,* 419 U.S. 393, 95 S.Ct. 553, 42 L.Ed.2d. 532 (1975), but that a judicially carved exception to the mootness doctrine applied when a claim was capable of repetition yet evading review. *See e. g., Doe v. Bolton,* 410 U.S. 179, 93 S.Ct. 739, 35 L.Ed.2d 201 (1973); *Moore v. Ogilvie,* 394 U.S. 814, 816, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969); *Southern Pacific Terminal Co. v. Interstate Commerce Commission,* 219 U.S. 498, 31 S.Ct. 279, 55 L.Ed. 310 (1911). The doctrine typically is employed when:

> The challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration; and (2) there [is] a reasonable expectation that some complaining party would be subjected to the same action again.

Weinstein v. Bradford, 423 U.S. 147, 149, 96 S.Ct. 347, 349, 46 L.Ed.2d 350 (1975); *In re Security Investment Properties, Inc.,* 406 F.Supp. 628 (N.D.Ga.1975); *Alberta Shumate, et al. v. T. M. "Jim" Parham,* C76-838A

(N.D.Ga., Feb. 22, 1977). The evidence in this action, as in *Penthouse I,* demonstrated: (1) that the "life" of an issue of one of plaintiffs' magazines is relatively short, approximately one month; and (2) that the alleged obscenity *vel non* of plaintiffs' publications may well rise again in this district. Accordingly, we conclude that the arguable obscenity of the January issues of plantiffs' publications presents a live justicible controversy. The parties presented a number of witnesses who sought to flesh out the skeletal standards enunciated in *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973)[15] and Ga.Code § 26-2101. Of course every element of the foregoing test must be met before a publication may be adjudicated obscene.

Professor Rubin, who testified on behalf of Penthouse, had impressive academic and literary credentials but his testimony was somewhat perfunctory and he gave the court little concrete data upon which his testimony was based except his perceptions about authors who appeared in several issues of "Penthouse." Dr. Clark, a licensed clinical psychologist, lost his credibility by insisting that "Raw Lust" and "Bamboo" (a publication consisting solely of pictures of bondage and masochism) might have significant scientific or therapeutic value. Likewise, defendant's experts, Dr. Fred Orr Crawford and Dr. Jo Cooley, who testified by deposition, were not particularly persuasive because they assumed virtually an absolutist position by contending that there was virtually nothing of value in plaintiffs' magazines.

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[15] The standard articulated in *Miller v. California,* 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973) is as follows:

> The basic guidelines for the trier of fact must be: (a)whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.* at 24, 93 S.Ct. at 2615.

The expert who was most persuasive and descriptive with respect to the specifics upon which his opinion was based was Dr. Ernest van den Haugg, a visiting professor of criminal justice and an adjunct professor of law at the University of Buffalo. In addition to having a law degree and an undergraduate degree in sociology and economics, Dr. van den Haugg, is a fully qualified psychoanalyst. Although he had testified previously in six to twelve obscenity cases, he had in each previous instance testified for the prosecution against *inter alia:* Screw magazine and the motion pictures, The Devil and Miss Jones, Behind the Green Door and Deep Throat.

In *Penthouse I* we expressed reservations about acting as a trier of fact where the applicable yardstick is one calibrated in terms of "contemporary community standards" but observed that the Supreme Court and lower federal courts have not differentiated obscenity from other substantive areas and have adhered to the usual parameters of the Seventh Amendment by holding that a judge may act as a finder of fact in civil proceedings involving obscenity. *Alexander v. Virginia,* 413 U.S. 836, 93 S.Ct. 2803, 37 L.Ed.2d 993 (1973); *Star v. Preller,* 375 F.Supp. 1093 (C.D.Md.), *aff'd,* 419 U.S. 956, 95 S.Ct. 217, 42 L.Ed.2d 173 (1974); *United Artists Corp. v. Harris,* 363 F.Supp. 857 (W.D.Okl.1973). Dr. van den Haugg testified that the leading criterion of community standards in terms of religious, ethical and moral matters was community size. In larger metropolitan areas of over one-half million population there generally is a higher proportion of young adults and a rapid rate of

environmental and attitudinal change. These factors tend to lead to a somewhat more liberal view of sex and obscenity than generally prevails in smaller population areas.

With respect to the balance of the *Miller* criteria, Dr. van den Haugg testified that "Oui" did not appeal to the prurient interest in sex, that is, to the shameful or morbid interest in sex, because the pictorial sections neither depicted excretion nor in most instances "focused" upon the genitals. Rather, he believed that the pictorial portions, although not always in the best of taste, generally promoted a *healthy, normal* interest in sex. Likewise, he stated that "Oui" was not patently offensive because the pictorial portions generally did not depict "acts." Rather, in the vast majority of instances, the models appeared alone without partners with whom they could engage in concerted activity. In the latter two respects, Dr. van den Haugg contrasted "Chic" in which the photographs focused on or revolved around the genital area and models repeatedly appeared engaged in obviously concerted sexual "acts" with partners. *See e. g., United States v. Pellegrino,* 467 F.2d 41 (9th Cir. 1972); *Hunt v. Keriakos,* 428 F.2d 606 (1st Cir.), *cert. denied,* 400 U.S. 929, 91 S.Ct. 185, 27 L.Ed.2d 189 (1970)). While we agree generally with the probity of some of the criteria offered by Dr. van den Haugg, we feel obligated to supplement his analysis.

[22] The third prong of *Miller,* "whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value," *id.* 413 U.S. at 24, 93 S.Ct. at 2615, appears to represent essentially a check upon the previous two elements. *See Jenkins v. Georgia,* 418 U.S. 153, 164, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974) (Brennan, Stewart and Marshall, concurring); *see also Roaden v. Kentucky, supra.* Moreover, the "taken as a whole" language in the first and third prongs of *Miller* appears to be designed to eliminate segmented review of a book or magazine when on balance the redeeming features of the work outweigh any of its arguably obscene portions.

[23] Solicitor McAuliffe has argued that the "taken as a whole" test was devised to apply to "works" and that when a magazine which typically is an eclectic publication containing several seemingly unrelated pieces tied together only by a central approach or theme is perused, discrete works within the magazine may be "taken as a whole" and may independently be adjudged obscene. In support of this position, Mr. McAuliffe refers the court to famous footnote seven of *Miller* which cites with approval the statement in *Kois v. Wisconsin,* 408 U.S. 229, 92 S.Ct. 2245, 33 L.Ed.2d 312 (1972), that "[a] quotation from Voltaire in the flyleaf of a book will not constitutionally redeem an otherwise obscene publication." Defendant McAuliffe's position is clearly incorrect.

[24, 25] First, the "taken as a whole" standard of *Miller* is not really new, *see Roth v. United States,* 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957), and simply reflects in essence the practical fact that an arguably obscene book or magazine is going to be published or banned as a discrete unit. It is practically impossible and legally impermissible for defendant McAuliffe to tiptoe through each and every "Playboy", "Oui" and "Penthouse" vended in Fulton County, scissors in hand, and to excise those portions of the magazine thought to be obscene. A magazine is a "whole" within the meaning of *Miller* and it must be judged as such.

[26] After carefully examining the January issues of "Playboy", "Penthouse" and "Oui", we conclude: (1) that each magazine individually taken as a whole does not encourage a shameful or morbid, rather than a healthy interest in sex; and (2) that the material in each magazine is not patently offensive because it rarely depicts conduct or "acts." Moreover, we found that the January issues of "Playboy", "Penthouse", and "Oui" have serious literary, artistic, political and scientific value.

For instance, the January issue of "Playboy" contained *inter alia:* (1) an interview with Jean-Paul Sartre; (2) "The Eleventh Hour Santa", a piece on last minute Christmas shopping ideas; (3) "Alex Haley's Candid Conversations", a reprint of the former Playboy interviewer's conversations with public figures such as Miles Davis, Cassius Clay, Malcolm X, Martin Luther King, Jr., and George Lincoln Rockwell; (4) a four article series concerning "Movie Making, Seventies Style" and (5) "Doctor Fast", a fiction piece by Erich Segal.

Likewise, the January, 1978 issue of Penthouse contained *inter alia:* (1) "Cartergate III" an article about the power and policies of United States Foreign affairs advisor Zbigniew Brzezinski; (2) "Africa, Jimmy Carter's Vietnam" by noted author Tad Szulc; (3) "The Vietnam Veteran's Advisor"; (4) "Improving Perfection"; a review of the 1978 Volvo 262C; and (5) "Why Carter Has To Give Away The Panama Canal In Order To Sell Out Taiwan" by Nicholas Von Hoffman.

Finally, the January, 1978 issue of "Oui" contains *inter alia:* (1) "Taking on the Censors", an article concerning obscenity and the First Amendment; (2) an interview with Jacqueline Bisset; (3) "The Fright Report" in which author Stephen King comments upon his works;

(4) "Cult T.V.", a piece about television shows that have remained popular long after their demise, and (5) "Hey Kids, Lets Rent The Old Barn And Plan An Invasion of Haiti", a spoof on revolutionary tactics and notions.

[**27, 28**] In sum then, we conclude that the January, 1978 editions of "Playboy", "Penthouse", and "Oui" have significant literary, artistic, political and scientific value which, independent of any other determinations which we have made, precludes finding them obscene. Any conflict between this view and that of a jury in a state criminal proceeding is one which is not necessarily irreconcilable but rather traceable solely to the multitude of fact finders provided for under *Miller v. California, supra; Penthouse International, Ltd. v. McAuliffe, supra* at 1257. While defendant McAuliffe is not required to agree with this construction, we say once again, hopefully for the last time, that he is obligated to view magazines "as a whole" in the future.

[**29**] Accordingly, for the reasons hereinabove expressed, it is hereby DECLARED: (1) that Mr. McAuliffe must apply the Georgia obscenity statute, Ga.Code § 26-2101 so as to consider magazines and other printed material "as a whole"; and (2) that the January, 1978 issues of "Playboy", "Penthouse" and "Oui" are not obscene within the meaning of *Miller v. California, supra,* and Ga.Code § 26-2101.[16] In all other respects, plaintiffs' claims for declaratory and injunctive relief are hereby DENIED.

IT IS SO ORDERED.

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[16] In deciding that *injunctive* relief is not warranted against defendant McAuliffe's construction of the taken as a whole language of *Miller* and Ga.Code § 26–2101, we, of course, employ the standard in this circuit:

> (1) [success] . . . on the merits; (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted; (3) . . . the threatened injury to plaintiff outweights the threatened harm the injunction may do to defendant, and (4) granting the preliminary [and permanent] injunction will not disserve the public interest.

Morgan v. Fletcher, 518 F.2d 236 (5th Cir. 1975); *Sadler v. 218 Housing Corp.*, 417 F.Supp. 348 (N.D.Ga.1976); *Hawthorn Environmental Association v. Coleman*, 417 F.Supp. 1091 (N.D.Ga.), *aff'd*, 551 F.2d 1055 (5th Cir. 1977). Because, under our previous order, a magistrate will make the initial obscenity determination, it is difficult to say that palintiffs have or will suffer irreparable injury as a result of Mr. McAuliffe's improper construction. Moreover, it would be improper to convert every attempted enforcement by defendant McAuliffe of § 26–2101 into an arguable contempt proceeding under this order. Nevertheless, the possibility that Mr. McAuliffe's view could be disseminated to *inter alia* magistrates and judges warrants declaratory relief to correct the misconception.

APPENDIX D

PENTHOUSE INTERNATIONAL, LTD.,
Plaintiff-Appellee,
v.
Hinson McAULIFFE, etc.,
Defendant-Appellant.

HUSTLER MAGAZINE, INC., etc.,
Plaintiff-Appellee,
v.
Hinson McAULIFFE, etc.,
Defendant-Appellant.

HIGH SOCIETY MAGAZINE, INC.,
Plaintiff-Appellee,
v.
Hinson McAULIFFE, etc.,
Defendant-Appellant.

EASTWAY ENTERPRISES, LTD.,
Plaintiff-Appellee,
v.
Hinson McAULIFFE, etc.,
Defendant-Appellant.

MONTCALM PUBLISHING CORPORATION,
Plaintiff-Appellee,
v.
Hinson McAULIFFE, etc.,
Defendant-Appellant.

PENTHOUSE INTERNATIONAL, LTD.,
Plaintiff-Appellee,
v.
Hinson McAULIFFE, Individually and as Solicitor General of the County of Fulton, State of Georgia, Defendant-Appellant.

PLAYBOY ENTERPRISES, INC.,
Plaintiff-Appellee,
v.
Hinson McAULIFFE, Individually and as Solicitor General for the County of Fulton, State of Georgia, Defendant-Appellant.

PLAYBOY PUBLICATIONS, INC.,
Plaintiff-Appellee,
v.
Hinson McAULIFFE, Individually and as Solicitor General for the County of Fulton, State of Georgia, Defendant-Appellant.

Nos. 77–2951, 78–2794.

United States Court of Appeals,
Fifth, Circuit.
610 F.2d 1353
Feb. 6, 1980.

Publishers of adult magazines brought suit to enjoin a Georgia Solicitor General from continuing to engage in an allegedly unconstitutional program of bad faith and harassment which included arrest of several retailers of the publishers' magazines, and to obtain a declaratory judgment that specific issues of the magazines were not obscene. The United States District Court for the Northern District of Georgia at Atlanta, 436 F.Supp. 1241, Richard C. Freeman, J., entered judgment for the publishers, and the Solicitor General appealed. The Court of Appeals, Thornberry, Circuit Judge, held: (1) that the Solicitor General's activities constituted prior restraint which was unconstitutional under the First Amendment, and (2) that two of the three magazines in question were obscene.

Affirmed in part and reversed in part.

Charles Clark, Circuit Judge, concurred and filed opinions.

Kravitch, Circuit Judge, concurred in part and dissented in part and filed opinion.

1. Arrest 63.3

In light of difficult obscenity test adopted by United States Supreme Court, Solicitor General's investigators, possessing no written instructions or written guidelines, were not capable of determining whether or not adult magazines were obscene and warrantless arrests of vendors of such magazines therefore could not be justified on basis of Georgia statute permitting officer to make warrantless arrest if offense is committed in his presence. Code Ga., § 27-207; U.S.C.A. Const. Amends. 1, 14.

2. Constitutional Law 90.1(8)

Solicitor General created informal system of prior restraint and effected constructive seizure of certain adult magazines without first allowing neutral, detached magistrate to make independent judicial determination of propriety of such seizure when he implemented calculated scheme which included public announcements in local newspapers, systematic visits to retailers of such magazines, and program of carefully timed warrantless arrests on basis of investigators' unilateral determination that magazines were obscene. Code Ga., § 27-207; U.S.C.A.Const. Amends. 1, 14.

3. Constitutional Law 90(1)

There is strong presumption against constitutional validity of system of prior restraint. U.S.C.A.Const. Amends. 1, 14.

4. Constitutional Law 90.1(8)

Constitution at minimum requires imposition of neutral, detached magistrate in procedure to make independent judicial determination of probable cause prior to issuance of arrest warrant or some other warrant authorizing seizure of allegedly obscene material to be used as evidence. U.S.C.A.Const. Amends. 1, 14.

5. Constitutional Law 90.1(8)
Declaratory Judgment 84

Procedure adopted by Solicitor General to discourage sale of allegedly obscene adult magazines, which included public announcements in local newspapers, systematic visits to retailers of magazines and program of carefully timed warrantless arrests which effected constructive seizure of such magazines prior to final adjudication upon issue of their obscenity vel non, did not comport with minimum constitutional requirements and amounted to informal system of prior restraint which violated First and Fourteenth Amendments; injunctive and declaratory relief against such system was appropriate. U.S.C.A.Const. Amends. 1, 4, 14.

6. Federal Courts 613

Appellate courts have power independently to review trial court finding on issue whether average person, applying contemporary community standards, would find that allegedly obscene work, taken as a whole, appeals to prurient interests. U.S.C.A.Const. Amend. 1.

7. Obscenity 5

Contrary to trial court's finding on such issue, two of three adult magazines, taken as a whole, appealed to prurient interest; third magazine did not. U.S.C.A. Const. Amend. 1.

8. Obscenity 5

In proceeding involving alleged obscenity of three adult magazines, trial court erred in concluding that two such magazines did not include patently offensive depictions or descriptions of sexual conduct; court's conclusion was correct, however, as to third magazine. U.S.C.A.Const. Amend. 1.

9. Obscenity 5

In determining whether allegedly obscene issue of adult magazine lacked serious literary, artistic, political or scientific value, court was required to treat magazine as separate work to be taken as a whole, and could not examine each separate article or pictorial presentation to determine whether it lacked such values. U.S.C.A.Const. Amend. 1.

10. Obscenity 5

Taken as a whole, issues of two adult magazines lacked serious literary, artistic, political or scientific value; such value was present, however, in issue of third adult magazine. U.S.C.A.Const. Amend. 1.

Larry E. Parrish, Memphis, Tenn., for defendant-appellant.

Herald Price Fahringer, Paul J. Cambria, Jr., Barbara J. Davies, Buffalo, N. Y., for plaintiff-appellee.

Carl Ruderman, pro se, for High Soc. Magazine, Eastway Enterprises, Ltd. and Montcalm Publishing Corp.

Gambrell & Mobley, James L. Paul, Katharine C. Robey, Atlanta, Ga., Grutman & Schafrann, Norman R. Grutman, New York City, for Penthouse Intern., Ltd.

Smith, Cohen, Ringel, Kohler & Martin, Warren C. Fortson, David K. Whatley, Atlanta, Ga., Devoe, Shadur & Krupp, Neil H. Adelman, Chicago, Ill., for Playboy Enterprises, Inc. and Playboy Publications, Inc.

Michael A. Bamberger, New York City, for American Booksellers Assoc., Inc., The Assoc. of American Publishers Inc., et al., amici curiae.

Appeals from the United States District Court for the Northern District of Georgia.

Before THORNBERRY, CHARLES CLARK and KRAVITCH, Circuit Judges.

THORNBERRY, Circuit Judge:

Penthouse International, Ltd. (Penthouse) and Hustler Magazine, Inc. (Hustler) separately filed complaints for declaratory and preliminary as well as permanent injunctive relief on July 29, 1977. Similar complaints were filed on August 2, 1977, by High Society Magazine, Inc. (High Society) and on August 4, 1977 by Eastway Enterprises Ltd. (Eros) and Montcalm

Publishing Corporation (Gallery).[1] These parties sought relief against McAuliffe as an individual and in his capacity as Solicitor General for Fulton County, Georgia. The publishers sought to enjoin McAuliffe's activities which culminated in prosecutions of individuals who sold the complainants' magazines for alleged violations of Georgia Code § 26-2101,[2] which prohibits the distribution of obscene materials. Complainants sought relief in their capacity as publishers of the magazines because their income is derived from the sale of magazines to a primary local distributor and several local retailers. These individuals were being arrested by McAuliffe and they refused to continue selling complainants' magazines. The substantive claims of the complainants arise under the First and Fourteenth Amendments to the United States Constitution.

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[1] Each of the appellees involved in this case is in the business of publishing magazines.

[2] Ga.Code § 26-2101—Distributing obscene materials

(a) A person commits the offense of distributing obscene materials when he sells, lends, rents, leases, gives, advertises, publishes, exhibits or otherwise disseminates to any person any obscene material of any description, knowing the obscene nature thereof, or offers to do so, or possesses such material with the intent to do so, provided that the word "knowing," as used herein, shall be deemed to be either actual or constructive knowledge of the obscene contents of the subject matter, and a person has constructive knowledge of the obscene contents if he has knowledge of facts which would put a reasonable and prudent person on notice as to the suspect nature of the material. Provided, however, the character and reputation of the individual charged with an offense under this law, and if a commercial dissemination of obscene material is involved, the character and reputation of the business establishment involved may be placed in evidence by the defendant on the question of intent to violate this law. Undeveloped photographs, molds, printing plates and the like shall be deemed obscene notwithstanding that processing or other acts may be re-

The complaint of each publisher alleged in essence that McAuliffe had embarked on an intentional course of conduct that resulted in the termination of sales of the August 1977 issues of their respective magazines in Fulton County, Georgia. This was allegedly accomplished through a program of bad faith and harassment including arrests of several retailers. The complainants sought a temporary restraining order against future arrests for alleged violations of the Georgia statute as well as against other intimidating conduct on the part of McAuliffe. They also sought preliminary and permanent injunctive relief. In addition, complainants sought a declaration that the August 1977 issues of their respective magazines were not obscene.

All of the complainants' cases were consolidated for purposes of discovery as were the applications for preliminary and permanent injunctions. On August 15 and 16, 1977, Judge Freeman conducted an evidentiary hearing resulting in the issuance of an order on August 25, 1977. This order permanently enjoined McAuliffe from making further arrests under Georgia Code § 26-2101 for the sale of the August issues of the publications in question without first obtaining an arrest warrant. Judge Freeman also declared that McAuliffe's enforcement activities under color of Georgia law, "consisting of numerous and harassing arrests with or without a warrant prior to a final adjudication upon the issue of obscenity *vel non* at an adversary hearing constitutes a prior restraint violative of the First and Fourteenth Amendments of the United States Constitution." *Penthouse International, Ltd. v. McAuliffe*, 436 F.Supp. 1241, 1256 (N.D.Ga.1977). Judge Freeman also declared that the August 1977 issue of "Penthouse" was not obscene within the meaning of *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), and the Georgia statute.

A second set of complaints was filed by Penthouse

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quired to make the obscenity patent or to disseminate it.

(b) Material is obscene if:

(1) to the average person, applying contemporary community standards, taken as a whole, it predominantly appeals to the prurient interest, that is a shameful or morbid interest in nudity, sex or excretion;

(2) the material taken as a whole, lacks serious literary, artistic, political or scientific value, and

(3) the material depicts or describes, in a patently offensive way, sexual conduct specifically defined in subparagraphs (i) through (v) below:

(i) acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;

(ii) acts of masturbation;

(iii) acts involving excretory functions or lewd exhibition of the genitals;

(iv) acts of bestiality or the fondling of sex organs of animals;

(v) sexual acts of flagellation, torture or other violence indicating a sadomasochistic sexual relationship;

(c) Additionally, any device designed or marketed as useful primarily for the stimulation of human genital organs is obscene material under this section.

(d) Material, not otherwise obscene, may be obscene under this section if the distribution thereof, or the offer to do so, or the possession with the intent to do so is a commercial exploitation of erotica solely for the sake of their prurient appeal.

(e) It is an affirmative defense under this section that dissemination of the material was restricted to:

(1) a person associated with an institution of higher learning, either as a member of the faculty or a matriculated student, teaching or pursuing a course of study related to such material; or

(2) a person whose receipt of such material was authorized in writing by a licensed medical practitioner or psychiatrist.

on December 9, 1977, and by Playboy Enterprises, Inc. and Playboy Publications, Inc. (Playboy) on December 14, 1977, against McAuliffe, individually and in his capacity as Solicitor General. These complaints sought declaratory and injunctive relief regarding the January 1978 issues of "Penthouse," "Playboy," and "Oui" magazines. The complaints alleged bad faith conduct on the part of McAuliffe in violation of Judge Freeman's earlier order dated August 25, 1977, and sought a declaration that the magazines in question were not obscene. Judge Freeman only granted declaratory relief in this case consisting of statements that the magazines in question were not obscene within the meaning of *Miller* and that McAuliffe must apply the Georgia statute so as to consider the magazines "as a whole."

Before evaluating the propriety of Judge Freeman's findings, an examination of the surrounding factual circumstances is warranted. In 1976, McAuliffe, as Solicitor General of Fulton County, Georgia, initiated a program in which action was taken against Atlanta's "yellow front" adult bookstores. Between January 1977 and August 1977, his office was responsible for bringing between fifteen and twenty obscenity cases to trial seeking convictions for the sale of hard-core materials in adult bookstores.

For some time before the arrests involved in this case, McAuliffe had received complaints that "obscene" materials were being vended at the airport newsstands. The magazines complained of were "Hustler," "High Society," "Oui," "Genesis" and "Playboy." In July of 1977, McAuliffe decided, as a result of his conclusion that his earlier prosecutions were having an insufficient deterrent effect, that his office would expand the scope of its actions by prosecuting for the sale of magazines deemed to be obscene, even though they were sold in convenience food stores and drug stores. McAuliffe determined that he would institute investigations which he expected would result in numerous arrests in various sections of Fulton County, Georgia. Two separate teams of investigators were dispatched to the north and south sides of Atlanta. A procedure was adopted whereby the investigators would usually identify themselves upon entering a retail establishment. They would then usually purchase a magazine and examine its contents. If the magazine was determined to be obscene, the retailer was asked if he was aware of the magazine's contents. If the retailer said yes, he was arrested without a warrant. If the retailer said no, the officers would return the next day to see if the magazines were still being displayed. If the magazines were still being displayed on the second trip, the retailer was then arrested. At no time did the investigators possess specific instructions concerning particularly named or identified issues of particular magazines. No written guidelines were provided for interpreting or enforcing the Georgia statute nor were any written instructions provided to the investigators. Neither McAuliffe nor his principal prosecutor reviewed in advance the particular magazines which served as the basis for the arrests. The investigators essentially possessed sole discretion for determining whether the Georgia statute was being violated. The only limitation was that they were required to establish that any offensive pictorial material appearing in a publication was in no way related to written material which might appear in the same publication.

McAuliffe began making arrests on July 18, 1977, and continued to do so until July 29, 1977, when Judge Freeman granted the complainants a temporary restraining order. On July 18, 1977, the investigators went to the Atlanta airport and arrested without a warrant Troy Poss, manager of the airport newsstand for selling "Penthouse," "Hustler," "Genesis," and "Oui," claiming a violation of the Georgia obscenity statute. While Mr. Poss was arrested for the sale of all four magazines, the investigator merely reviewed "Hustler" for about thirty minutes and the other three magazines for a total of five minutes before making the arrest. On the same day, Mr. Sidney Gordon was arrested without a warrant at Mill's Discount drugs for selling "Hustler." On the next day, Mr. Asa Hall was arrested without a warrant at the Nifty Food Mart for selling "High Society," "Genesis," and "Oui." On that date, articles appeared in the Atlanta Constitution and the Atlanta Journal describing the arrest of Mr. Poss and including statements from McAuliffe which indicated that more arrests would be made and that all those involved in the sale and distribution of "obscene" materials would go to jail. On July 21, 1977, Edward Elson, President of Atlanta News Agency, Inc., was arrested on a multicount accusation for the sale of various magazines published by some of the complainants.

On July 27, 1977, another article appeared in the Atlanta Constitution in which McAuliffe stated that his plan was obviously working because his men were not finding any additional violations. This could be explained by an action taken by Atlanta News Agency, Inc., the wholesale distributor of essentially all of these

magazines. The company called all of its retailers and advised them to remove the magazines in question from their shelves. The second article, in addition to quoting McAuliffe, went on to state that it had found two newsstands still vending the publications. By nightfall, the proprietors of both newsstands had been arrested without a warrant. The article also stated that McAuliffe indicated he would start charging the owners as well as the employees who were selling the magazines in question. A final arrest was made without a warrant on July 29, 1977, at the Brothers III Package and Grocery Store. In addition to the arrests identified above, McAuliffe's investigators often made their presence known to other retailers throughout Fulton County.

In the second case, involving the January 1978 issues of "Playboy," "Penthouse," and "Oui," the prior restraint issue is not properly presented because the magazines were actually vended in Fulton County pursuant to an agreement with McAuliffe and because the allegedly unconstitutional procedures were never applied to the January issues of the magazines. Therefore the only issue in the second case is whether Judge Freeman correctly found that the magazines were not obscene within the meaning of *Miller* and the proper application of the "taken as a whole" test.

PRIOR RESTRAINT

McAuliffe contends that Judge Freeman incorrectly found that the actions of his investigators created an informal system of prior restraint in violation of the First and Fourteenth Amendments to the United States Constitution. He first relies on the general principle that a police officer may make a warrantless arrest when he views a crime being committed in his presence. McAuliffe claims that his investigators had sufficient expertise to determine that the Georgia obscenity statute was being violated thus giving them probable cause to make a warrantless arrest. But even if the arrests were improperly made without a warrant, McAuliffe claims he did not "seize" anything since the retailers and wholesalers "voluntarily" withdrew the publications from their shelves. Therefore, he states that no "constructive seizure" occurred that could result in a prior restraint and there was thus no constitutional violation.

A. Warrantless Arrests.

[1] McAuliffe initially contends that the warrantless arrests were proper because his officers viewed a violation of the Georgia obscenity statute in their presence. He relies on Georgia Code § 27-207 which provides that "[a]n arrest for a crime may be made by an officer . . . without a warrant if the offense is committed in his presence." The problem with appellant's claim is that the ability to make a warrantless arrest for an offense committed in the officer's presence contemplates the officer's ability to determine that an offense has actually been committed. Appellant is attempting to apply a statute normally appropriate for the case of a fleeing robber to items presumptively protected by the First Amendment. Appellant is incorrect in his belief that he or his agents may properly make the initial determination concerning the obscenity of a publication and that he may make a warrantless arrest if he determines that the subject matter of a publication is obscene.

McAuliffe was attempting to control items that are

presumptively protected material because of the language of the First Amendment. *Maquin v. Miller*, 433 F.Supp. 223 (D.Kan.1977); *Sooner State News Agency, Inc. v. Fallis*, 367 F.Supp. 523 (N.D.Okl. 1973); *Cinema Classics Limited v. Busch*, 339 F.Supp. 43 (C.D.Cal.), *aff'd*, 409 U.S. 807, 93 S.Ct. 105, 34 L.Ed.2d 66 (1972). Therefore, a retailer or distributor of presumptively protected material must be afforded greater procedural safeguards before a seizure or "constructive seizure" may take place. *Roaden v. Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973). These safeguards acquire an even greater importance because of the fine line that must be drawn between material that is literary and material that is "obscene." Justice Brennan stated "it is clear that as long as the *Miller* test remains in effect, 'one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so.' " *Jenkins v. Georgia*, 418 U.S. 153, 94 S.Ct. 2750, 41 L.Ed.2d 642 (1974) (Brennan, J., concurring). While Justice Brennan's statement is of course an exaggeration of the procedure required before a publication becomes subject to seizure because of its obscenity, it indicates the difficulty in applying the *Miller* test. We find that McAuliffe's investigators, possessing no written instructions or written guidelines, could not determine whether or not the magazines were obscene in light of the difficult test adopted by the Supreme Court in *Miller*. *See In re Louisiana News Company*, 187 F.Supp. 241 (E.D.La. 1960). There must be some judicial determination of obscenity *before* a seizure or "constructive seizure" may occur. *United States v. Hunt*, 496 F.2d 888 (5 Cir. 1974). Therefore, McAuliffe may not rely on Georgia

Code § 27-207 because his investigators were not able to determine whether an offense had been committed in their presence. As was the case with the arrest of Troy Poss, proprietor of a magazine stand at the Atlanta airport, an examination of four magazines by McAuliffe's investigators for a total of thirty-five minutes is not sufficient to justify a warrantless arrest. The only question remaining is, assuming the existence of a constructive seizure that creates a system of informal prior restraint, did a judicial determination of obscenity occur at a proper time to comport with minimum constitutional requirements.

B. Informal System of Prior Restraint.

[2] We must first determine whether the district court correctly found that McAuliffe created an informal system of prior restraint. McAuliffe claims that the district court must have erred because he did not actually "seize" anything. He claims that the retailers and distributors voluntarily removed the publications in question from their shelves. This view ignores the substance of the actions taken by McAuliffe and his investigators. Courts must look through the form to the substance when examining whether a system of informal prior restraint has been created. *Bantam Books v. Sullivan,* 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963); *Allied Artists Picture Corp. v. Alford,* 410 F.Supp. 1348 (W.D.Tenn.1976).

We are not the first court to look past the form of a transaction and examine its substance. Threats of prosecution or of license revocations on the part of prosecutors have been enjoined in several cases. The Supreme Court in *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1963), examined a situation where the Rhode Island Legislature had created the "Rhode Island Commission to Encourage Morality in Youth" for the nominal purpose of informing the public about publications containing "obscene, indecent or impure language." The Commission's practice was to notify a distributor that it had reviewed certain books or magazines which he distributed and that a majority of the Commission believed that the publication was objectionable for distribution to youthful readers. The reaction of the distributors after receiving a notice would often be to stop further circulation of the listed publication to retailers in Rhode Island and to visit the retailers for the purpose of retrieving the unsold copies. After the notice had been received, a local police officer would often visit a distributor to determine what action had been taken. The Supreme Court held that this scheme adopted by the Rhode Island Commission violated the Fourteenth Amendment. The distributors and retailers, by reason of intimidation and the threat of prosecution, were forced to cease selling the "suspect" publications. The Supreme Court found that even though the distributors would violate no law if they refused to cooperate with the Commission, compliance with the directives was *not voluntary.* The scheme was described as a "system of prior administrative restraints" operating without judicial supervision. Not only was there no provision for judicial superintendence before the notices were issued, but there was also no judicial review of the Commission's determinations. In addition, a distributor was not entitled to notice and hearing before the publications were listed as objectionable.

The procedure adopted and enforced by McAuliffe and his office resemble the procedure scrutinized in *Bantam Books.* McAuliffe, with the use of a calculated scheme that included public announcements in the local newspapers, systematic visits to retailers of the magazines in question, and a program of carefully timed warrantless arrests, effected a "constructive seizure" of the complainant's publications without first allowing a neutral, detached magistrate to make an independent judicial determination of the propriety of the seizure. *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); *United States v. Prescott,* 599 F.2d 103 (5 Cir. 1979).

It cannot be said that the retailers of the magazines in question "voluntarily" removed the magazines from their shelves. As in *Bantam Books,* the procedure adopted by McAuliffe was a "constructive seizure" and constituted a prior restraint. McAuliffe initiated his scheme on July 18, 1977, by making two arrests. This was followed by a third arrest on the next day as well as statements by McAuliffe printed in an Atlanta paper making it clear to all retailers selling the suspect magazines that they would be arrested. The most significant arrest occurred on July 21, 1977, when Mr. Edward Elson, President of Atlanta News Agency, Inc., was arrested for the sale of eight enumerated magazines. Atlanta News Agency, Inc. serviced approximately 90% of the approximately 1,000 retail outlets in Fulton County, Georgia. After Mr. Elson's arrest, Atlanta News Agency, Inc. refused to sell the magazines involved in this appeal and warned its retailers of the danger of doing so. There were no further arrests until July 27, 1977, presumably because there were no further violations. On this day, an Atlanta

newspaper reported that its investigation revealed that McAuliffe's actions were almost completely effective in driving the suspect publications from the newsstands of Fulton County. It reported of two newsstands still vending the magazines in question but the proprietors of both stands were arrested before nightfall of the day the article was printed. In addition to the arrests, McAuliffe's investigators made visits to other establishments to assure that the magazines had been removed from the shelves. Because McAuliffe's activities constituted a calculated scheme of warrantless arrests and harassing visits to retailers, we must conclude that the *substance* of the procedures resulted in a "constructive seizure" of the magazines from the shelves of the Fulton County retail establishments and created an informal system of prior restraint. *Cf. Dombrowski v. Pfister,* 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965); *compare Wood v. State,* 144 Ga. App. 236, 240 S.E.2d 743 (1977) (warrantless arrest of individual who sold two obscene magazines to policeman did not constitute a seizure or prior restraint because the arrest was not part of a calculated scheme resulting in a constructive seizure) *with Hall v. State,* 139 Ga.App. 488, 229 S.E.2d 12 (1976) (actual seizure of film pursuant to warrantless arrest constituted unconstitutional prior restraint).

C. Unconstitutional Prior Restraint.

[3] The final question requires a determination whether the district court correctly found that the informal system of prior restraint was proscribed by the First and Fourteenth Amendments to the United States Constitution. We must initially note that there is a strong presumption against the constitutional va-

lidity of a system of prior restraint. *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971); *Bantam Books, supra; Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1930); *International Society for Krishna Consciousness of Atlanta v. Eaves*, 601 F.2d 809 (5 Cir. 1979). When dealing in the area of presumptively protected material, greater procedural safeguards must be afforded before the occurrence of a "constructive seizure." This usually involves the requirement of a judicial determination of some type by a neutral, detached magistrate either before or immediately after the seizure of allegedly obscene material.

[4] The Supreme Court decided two cases on the same day that essentially established the minimum constitutional requirements for determining when a seizure of allegedly obscene materials constitutes an unconstitutional prior restraint. *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973); *Roaden v. Kentucky*, 413 U.S. 496, 93 S.Ct. 2796, 37 L.Ed.2d 757 (1973). In *Heller*, a judge of the New York Criminal Court, after viewing a film in its entirety, signed a search warrant for the seizure of the film and three arrest warrants because he believed that the film was obscene. No one at the theatre was notified or consulted prior to the issuance of the warrants and the film was seized without a prior adversary hearing. The Supreme Court upheld this procedure since the film was examined by a neutral, detached magistrate who had a full opportunity for an independent judicial determination of probable cause prior to issuing the warrant. The film was declared obscene following an adversary trial occurring within 48 days after the temporary seizure of the film. This procedure was approved because a seizure of one film to be used as evidence does not constitute a final restraint but merely a temporary seizure. In *Roaden*, a film which was being exhibited was also temporarily seized as evidence but without the authority of a constitutionally sufficient warrant. The Supreme Court found that, in light of the absence of a prior determination by a judicial officer on the question of obscenity, the seizure of the film created a form of prior restraint that rendered the seizure unreasonable under the Fourth Amendment to the United States Constitution. Taken together, *Heller* and *Roaden* establish the *minimum* constitutional requirement for a seizure of allegedly obscene materials. The Constitution at a minimum apparently requires the imposition of a neutral, detached magistrate in the procedure to make an independent judicial determination of probable cause prior to issuing an arrest warrant or some other warrant authorizing the seizure of allegedly obscene material to be used as evidence. *See Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 88 S.Ct. 2103, 20 L.Ed.2d 1313 (1968).

[5] But the procedure adopted and enforced by McAuliffe was much more dramatic and devastating than the mere seizure of one film to be used as evidence. Instead, it resulted in the "constructive seizure" of every magazine in Fulton County, Georgia, that McAuliffe deemed to be obscene. The arrests effectuating this "constructive seizure" were made without warrants and the issue of obscenity was never examined by a neutral, detached magistrate. While the Supreme Court has indicated that a complete judicial adversary hearing may be required before or shortly after initiat-

ing a series of warrantless arrests that have the obvious effect of seizing presumptively protected materials, we need not go this far. *See McKinney v. Alabama*, 424 U.S. 669, 96 S.Ct. 1189, 47 L.Ed.2d 387 (1976); *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965); *A Quantity of Books v. Kansas*, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809 (1964); *Marcus v. Property Search Warrant*, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961). *See also Classics, Ltd. v. Busch*, 339 F.Supp. 43 (C.D.Cal.) *aff'd*, 409 U.S. 807, 93 S.Ct. 105, 34 L.Ed.2d 66 (1972); *Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159, 169-72 (5 Cir. 1979) (en banc); *cf. G.I. Distributors, Inc. v. Murphy*, 490 F.2d 1167 (2d Cir. 1973), *cert. denied*, 416 U.S. 939, 94 S.Ct. 1941, 40 L.Ed.2d 290 (1974). It is enough to note that the procedure adopted by McAuliffe, including a series of warrantless arrests, does not comport with the minimum constitutional requirements enumerated in *Heller* and *Roaden*. Therefore, we conclude that the district court did not err in concluding that McAuliffe's enforcement activities of numerous and harassing arrests prior to a final adjudication upon the issue of obscenity *vel non* subjected the August issues of the magazines in question to an informal system of prior restraint in violation of the First and Fourteenth Amendments. Injunctive and declaratory relief directed against this system is appropriate. Based on this finding, we need not reach the issue of whether the magazines seized in July and August of 1977 were actually obscene. *Korioth v. Briscoe*, 523 F.2d 1271, 1274-75 (5 Cir. 1975).

OBSCENITY VEL NON

The second case, involving only the January 1978 issues of "Penthouse," "Playboy," and "Oui," requires an examination of the three magazines to determine whether they are obscene. The Supreme Court established basic guidelines governing such a determination in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), and applied these guidelines in four other cases decided on the same day. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446 (1973); *United States v. Orito*, 413 U.S. 139, 93 S.Ct. 2674, 37 L.Ed.2d 513 (1973); *Kaplan v. California*, 413 U.S. 115, 93 S.Ct. 2680, 37 L.Ed.2d 492 (1973); *United States v. 12 200—Ft. Reels of Super 8 mm. Film*, 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500 (1973). In *Miller*, the Supreme Court rejected the idea of applying a uniform national standard to determine what appeals to the prurient interest and what is patently offensive in favor of a three-prong test which examines:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. at 24, 93 S.Ct. at 2615. This test applies to state as well as federal legislation. *See United States v. Orito*, 413 U.S. at 145, 93 S.Ct. 2674.

When examining a publication to determine whether it is obscene, it is significant to remember that the *Miller* test is conjunctive so every element of the test must be met before a publication may be adjudicated obscene. In this case, we will adhere to the format adopted by our decision in *United States v. Thevis,* 484 F.2d 1149 (5 Cir. 1972), in which we used a chart to demonstrate whether each separate magazine met each prong of the *Miller* test.

The first and second prongs of the *Miller* test apply contemporary community standards to questions of fact such as "appeal to the prurient interest" and "patent offensiveness." *Smith v. United States,* 431 U.S. 291, 300-01, 97 S.Ct. 1756, 1763, 52 L.Ed.2d 324, 334-35 (1977). Contemporary community standards are not applied in the third prong of the *Miller* test. *Id.* While these questions are normally presented to a jury, a judge may act as a finder of fact in civil proceedings involving obscenity. *Alexander v. Virginia,* 413 U.S. 836, 93 S.Ct. 2803, 37 L.Ed.2d 993 (1973); *Star v. Preller,* 375 F.Supp. 1093 (C.D.Md.) *aff'd,* 419 U.S. 956, 95 S.Ct. 217, 42 L.Ed.2d 173 (1974); *United Artists Corp. v. Harris,* 363 F.Supp. 857 (W.D.Okl. 1973). The finder of fact is entitled to draw on his own knowledge of the views of the average person in the community from which he comes for making the necessary determination in a manner similar to the "reasonable" person test found in other areas of the law. *Stone v. New York, C. & St.L.R.Co.,* 344 U.S. 407, 73 S.Ct. 358, 97 L.Ed. 441 (1953); *Schulz v. Pennsylvania R. Co.,* 350 U.S. 523, 76 S.Ct. 608, 100 L.Ed. 668 (1956). The impact of the material is to be judged by its impact on an average person as opposed to a particularly sensitive or insensitive person.

The fact finder is limited though in that he clearly does not possess unbridled discretion in determining what is patently offensive sexual conduct or what lacks serious value. The Court in *Miller* noted that First Amendment values applicable to the states are protected by powers vested in the appellate courts to make an independent review of constitutional claims. 413 U.S. at 25, 93 S.Ct. 2607. In a concurring opinion, Justice Brennan spoke of the extent of the power of independent review in obscenity cases when he stated:

> After the Court's decision today, there can be no doubt that *Miller* requires appellate courts—including this Court—to review independently the constitutional fact of obscenity. Moreover, the Court's task is not limited to reviewing a jury finding under part (c) of the *Miller* test that "the work, taken as a whole, lack[ed] serious literary, artistic, political, or scientific value." *Miller* also requires independent review of a jury's determination under part (b) of the *Miller* test that "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law."

Jenkins v. Georgia, 418 U.S. 153, 163-64, 94 S.Ct. 2750, 2756, 41 L.Ed.2d 642 (1974) (Brennan, J., concurring) (citation omitted.)

The first prong examines whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest. This test was first formulated in *Roth v. United States,* 354 U.S. 476, 77 S.Ct. 1304, 1

L.Ed.2d 1498 (1958), where the Court adopted the definition of prurient interest stated in the A.L.I. Model Penal Code, § 207.10(2) (Tent. Draft No. 6, 1957), of "a shameful or morbid interest in nudity, sex, or excretion." 354 U.S. at 487, n. 20, 77 S.Ct. at 1310, n. 20. As stated above, this test is for the most part a factual question to be examined by the fact finder. Judge Freeman, in his Order of July 7, 1978, stated "that each magazine individually taken as a whole does not encourage a shameful or morbid, rather than a healthy interest in sex" and therefore does not appeal to the prurient interest. *Penthouse International, Ltd. v. McAuliffe*, 454 F.Supp. 289 (N.D.Ga.1978).

[6] A question arises though in determining the proper standard of review we are to apply when evaluating Judge Freeman's finding. The question of appeal to the "prurient interest" is essentially a question of fact, indicating that Judge Freeman's finding will only be reversed if clearly erroneous. But the Supreme Court in *Miller* stated that "the First Amendment values applicable to the States through the Fourteenth Amendment are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary." 413 U.S. at 25, 93 S.Ct. at 2615. *Miller* requires appellate courts "to review independently the constitutional fact of obscenity." *Jenkins v. Georgia*, 418 U.S. at 163, 94 S.Ct. at 2756 (Brennan, J., concurring). The problem is that in an attempt to clarify these statements, the Supreme Court has only specifically stated that the concept of independent review applies to the second and third prongs of the *Miller* test without explicitly claiming that it also governs the first prong. Under the test

applied prior to *Miller*,[3] it was obvious that independent review applied to the first prong because the issue of whether the "dominant theme" of a work appealed to the prurient interest presented a clear question of constitutional fact. *Kois v. Wisconsin*, 408 U.S. 229, 92 S.Ct. 2245, 33 L.Ed.2d 312 (1972). Despite the Supreme Court's removal of the "dominant theme" portion of the first prong in *Miller*, we note that the first prong retains some aspects subject to independent review in that contemporary community standards "must leave room for some latitude of judgment" and because there is an undeniable subjective element in the test as a whole. *Id.* at 232, 92 S.Ct. at 2247. We therefore find that the Supreme Court has impliedly retained in the appellate courts the power to independently review a finding made under the first prong of the *Miller* test. *See Smith v. United States*, 97 S.Ct. at 1763-64; *Jenkins v. Georgia*, 418 U.S. at 160, 163-64, 94 S.Ct. 2750; *Miller v. California*, 413 U.S. at 25, 93 S.Ct. 2607; *Kois v. Wisconsin*, 407 U.S. at 232, 92 S.Ct. 2245. We find additional support for this finding from our opinion in *United States v. Thevis*, 484 F.2d 1149 (5 Cir. 1973), where, in a chart examining twelve allegedly obscene magazines, we apparently made an independent determination that all three prongs of the *Miller* test either were or were not satisfied.

[7] We realize that Judge Freeman, as a member of the community of Fulton County, Georgia, is probably able to determine whether the average person, applying contemporary community standards would find that a work taken as a whole appeals to the prurient interest. But in this case, we must exercise our power of independent review and declare that taken as a whole, "Penthouse" and "Oui" appeal to the prurient interest. When taking either magazine as a whole, a combination of the pictorial depictions as well as several items, consisting of unsolicited letters and comments giving an in-depth description of sexual conduct, can be said to appeal to a shameful interest in sex. Therefore, "Penthouse" and "Oui" satisfy the first prong of the *Miller* test. Judge Freeman was correct with respect to his finding as to "Playboy." This conclusion is represented in Table I, *infra.*

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[3] In *Roth* the Court stated the test as follows:

> "whether to the average person, applying contemporary community standards, the *dominant theme* of the material taken as a whole appeals to prurient interest." 354 U.S. at 489, 77 S.Ct. at 1311 (emphasis added).

[8] The second prong examines whether the work depicts or describes sexual conduct specifically defined by the applicable state law in a manner that the fact finder would say that the average person, applying contemporary community standards would find patently offensive. This prong therefore involves both a substantive component and an objective component. *Smith v. United States,* 97 S.Ct. at 1764. The substantive component examines what constitutes "hard core" sexual conduct as defined by the state statute. The Court in *Miller* gave several examples of what a state statute could define for regulation. This included "[p]atently offensive representations or descriptions of the ultimate sexual acts, normal or perverted, actual or simulated" as well as "[p]atently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals." Taking its cue from the Supreme Court, the Georgia legislature defines sexual conduct to include:

> (i) acts of sexual intercourse, heterosexual or homosexual, normal or perverted, actual or simulated;
>
> (ii) acts of masturbation;
>
> (iii) acts involving excretory functions or lewd exhibition of the genitals;
>
> (iv) acts of bestiality or the fondling of sex organs of animals;
>
> (v) sexual acts of flagellation, torture or other violence indicating a sadomasochistic sexual relationship;

Ga.Code § 26-2101 (b) (3). An examination of the January 1978 issues of Playboy, Penthouse, and Oui reveals that the only sexual conduct arguably *depicted* was the "lewd exhibition of the genitals." A distinction must be made between an act involving an exhibition of the genitals that is lewd and an exhibition that is not lewd. *Jenkins v. Georgia,* 418 U.S. at 161, 94 S.Ct. 2750. Nudity alone is not obscene. *Id.* The pictorial portions of the magazines in question in all but one case appeared as singles (showing only one person). The pictures in question consist of color photographs of young women either largely or totally undressed, exposing various portions of their bodies. The models were not engaged in concerted sexual *acts* with partners but several pictures in "Penthouse" showed the touching of the genitals. In the photographic material in "Penthouse" entitled "Tender Loving Carrie," two photographs are included in which the naked woman has her finger inserted into the lips of her genitals, so that it contacts her clitoris, her eyes closed, her mouth open, and an expression consistent with masturbation on her face. This certainly constitutes a depiction of sexual conduct under Georgia law since § 26-2101(b) (3) includes depictions of "acts of masturbation." Judge Freeman appears correct in his determination that the material in each magazine except "Penthouse" does not *depict* sexual conduct. It is difficult to argue that the other pictorial presentations *depict* acts involving the lewd exhibition of genitals.

The difficult portion of the test requires an examination of the meaning of the phrase "or describes sexual conduct." Taken literally, this connotes *verbal* description. If such is the case, all three magazines "describe sexual conduct." In "Playboy," an article entitled "Take My Wife—Please" describes acts of sexual intercourse. In "Oui," two features entitled "Sex Tapes" and "Sex Tape Letters" consist of a detailed description of acts of sexual intercourse and acts of masturbation. The same can be said of items in 'Penthouse" entitled "Penthouse Forum," "Call Me Madam," "Couples," and an article entitled "The Skins of Peggy." In most cases, the description is in the form of letters from the magazines' readers describing their sexual experiences or sexual fantasies. While the focus in recent obscenity cases has virtually always revolved around pictorial presentations, it cannot be said that the literal meaning of "describes sexual conduct" should be ignored. Therefore, the magazines in question arguably satisfy the substantive component.

But even if the material depicts or *describes* sexual conduct as defined in the Georgia statute, the objective portion of the test states that this must be done in a "patently offensive" way. Judge Freeman, as the fact finder, made a determination that the material in each magazine is "not patently offensive because it rarely depicts conduct or 'acts.'" *Penthouse International, Ltd. v. McAuliffe*, 454 F.Supp. at 303. As stated above, the fact finder does not have unbridled discretion in the determination of what constitutes patently offensive material. This is a matter subject to our independent review. *Smith v. United States*, 97 S.Ct. 1763-64. With respect to the "depiction" issue, Judge Freeman correctly determined that "Oui" and "Playboy" did not depict sexual conduct. The Georgia statute speaks of depicting "acts." Such was only found in "Penthouse," and in that case it was patently offensive. A problem arises in that Judge Freeman apparently did not address the issue of whether the magazines "describe sexual conduct" in a patently offensive way.

In "Playboy," the only arguably offensive description of sexual conduct was found in four paragraphs of a seven page article by Dan Greenburg entitled "Take My Wife—Please." The article was well written and not patently offensive.

The issue is much closer in the case of "Oui" and "Penthouse." For the most part, this occurs not because of the articles appearing in the respective magazines but due to certain segments of the publication in which surveys and unsolicited letters are printed describing sexual experiences in detail. In "Penthouse," the patently offensive descriptions of sexual conduct are found in the items mentioned above entitled "Penthouse Forum," "Call Me Madam," "Couples," and "The Skins of Peggy." In "Oui," they are entitled "Sex Tapes" and "Sex Tape Letters." Included in both magazines are in-depth descriptions of acts of sexual intercourse, heterosexual and homosexual, normal and perverted, acts of masturbation, cunnilingus, fellatio, and acts involving lewd exhibition of the genitals. Each of these items not only describes "hard core" sexual conduct but does so in such a manner that exceeds the customary limits of good taste usually found in literature. The explicitness and amount of detail coupled with the offensive language used to describe the actual sexual experiences or sexual fantasies were presented in such a manner that was patently offensive. Except for the one article ("Skins of Peggy"), the patently offensive material is not written by the authors of the respective magazines but consists of letters or comments written by the readers of the magazines. But the publishers chose to incorporate this material into their publications so they must suffer the consequences. These items have no place in a magazine that otherwise could be said to possess literary merit.

While we realize that Judge Freeman, as a member of the community, should possess insight as to what the average person of Fulton County, Georgia, applying contemporary community standards would find patently offensive, we must exercise our power of independent view. This is especially important because Judge Freeman may have not examined the question of "describing sexual conduct." We therefore conclude that the district court incorrectly determined that "Penthouse" and "Oui" do not include patently offensive depictions or descriptions of sexual conduct. *See* Table I, *infra.*

[9] The third prong of the *Miller* test examines "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." This replaced the "utterly without redeeming social value" test of *Memoirs v. Massachusetts*, 383 U.S. 413, 86 S.Ct. 975, 16 L.Ed.2d 1 (1966). While appellant concedes that the January 1978 issues of "Playboy," "Penthouse," and "Oui" contain articles possessing serious value, controversy exists over the meaning of a "work, taken as a whole." Appellant initially contends that a magazine is not a "work" but a "volume" composed of many "works." Therefore, appellant would view each separate article and pictorial presentation, to determine whether each "work" in a "volume" is obscene under the *Miller* test. We conclude that decisions of both the Supreme Court and this court require us to treat each magazine as a separate work that is to be taken as a whole.

The basic guidelines for judging obscenity have significantly changed since their initial formulation in *Regina v. Hicklin*, L.R. 3, Q.B. 360 (1868). In *Regina*, the court determined that material could be judged as obscene by viewing only isolated excerpts of a publication and the effect these excerpts had upon particularly susceptible persons. This test was adopted by some American courts but later decisions have rejected it. *United States v. One Book Entitled Ulysses*, 72 F.2d 705 (2d Cir. 1934) (rejected test when government attempted to prevent circulation of James Joyce's *Ulysses* in the United States). In *Ulysses*, Judge Augustus Hand found some parts of the book to be obscene but stated that it was not obscene when "taken as a whole." The Supreme Court specifically rejected the segmented approach of *Regina* in *Roth v. United States*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). In holding that the material alleged to be obscene in *Roth* must be considered as a whole, the Supreme Court specifically approved the following instruction:

> The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and you are not to consider detached or separate portions in reaching a conclusion.

354 U.S. at 490, 77 S.Ct. at 1312. The first and third prongs of the *Miller* test adopt essentially the same language by stating that the "work, taken as a whole" must "appeal to the prurient interest" and lack "serious literary, artistic, political, or scientifie value."

The crucial issue requires a determination of the meaning of "work, taken as a whole" when applied to magazines. The test is easily applied to books and films but appellant argues that a magazine is merely a publication containing several unrelated pieces connected only by a central approach. Appellant therefore contends that each article and pictorial presentation is a "work" and a magazine is merely a conglomeration of these works resulting in a "volume." We cannot agree with appellant's contention.

While there has been no significant authority since *Miller* applying the "taken as a whole" test to magazines, the critical date to examine is 1957 when the Supreme Court first rejected the isolated excerpt approach in *Roth.* Since that time, the Supreme Court has examined several magazines resulting in a determination that, "taken as a whole," they were either obscene or not obscene. The first opportunity arose in *Manual Enterprises, Inc. v. Day,* 370 U.S. 478, 82 S.Ct. 1432, 8 L.Ed.2d 639 (1962), where the Postmaster General withheld delivery of 405 copies of three magazines on the grounds that the magazines violated the federal obscenity statute. After an evidentiary hearing before the Judicial Officer of the Post Office Department, there ensued an administrative hearing where the magazines were found to be obscene. The District Court and Court of Appeals agreed that the magazines were obscene but the Supreme Court reversed. Justice Harlan rejected the government's "isolated excerpt" approach stating that:

> Whether "hard-core" pornography, or something less, be the proper test, we need go no further in the present case than to hold that the magazines in question, *taken as a whole,* cannot, under any permissible constitutional standard, be deemed to be beyond the pale of contemporary notions of rudimentary decency.
>
> We cannot accept in full the Government's description of these magazines which, contrary to *Roth* . . . tends to emphasize and in some respects overdraw certain features in several of the photographs, at the expense of what the magazines fairly *taken as a whole* depict.

370 U.S. at 489, 82 S.Ct. at 1438 (citations omitted) (emphasis added). The Court conducted an independent examination of the magazines and found that they were not obscene.

The issue again arose in *Ginzburg v. United States,* 383 U.S. 463, 86 S.Ct. 942, 16 L.Ed.2d 31 (1966), where Ginzburg had been convicted for violation of the federal obscenity statute. The only issue before the Court was whether the standards enunciated in *Roth* were correctly applied to "EROS," a hard-cover magazine, and "Liaison," a biweekly newsletter. The trial judge concluded that only four of the fifteen articles in "EROS" predominantly appealed to the prurient interest and substantially exceeded community standards while the other eleven articles were not offensive. Despite this quantitative determination, he found the magazine to be obscene taken as a whole. The Court stated that:

> Our affirmance of the convictions for mailing EROS and Liaison is based upon their characteristics *as a whole*, including their editorial formats, and not upon particular articles contained, digested, or excerpted in them. Thus we do not decide whether particular articles, for example, in EROS, although identified by the trial judge as offensive, should be condemned as obscene whatever their setting.

383 U.S. at 466, n. 5, 86 S.Ct. at 945 n. 5 (emphasis added).

While the Supreme Court has never explicitly stated that the "taken as a whole" test is applied as strongly to magazines as to books and films, the language of *Manual Enterprises* and *Ginzburg* gives every indication that magazines are always to be considered as whole works even though made up of separate articles. The only exception occurs when there is a sham attempt to insulate obscene material with non-obscene material. *See Kois v. Wisconsin, supra; Flying Eagle Publications, Inc. v. United States*, 285 F.2d 307 (1st Cir. 1961); *Louisiana v. Gambino*, 362 So.2d 1107 (La. 1978), *cert. denied*, 441 U.S. 927, 99 S.Ct. 2042, 60 L.Ed.2d 402 (1979); *Washington v. J-R Distributors, Inc.*, 82 Wash. 584, 512 P.2d 1049 (1973).[4] This would occur, for example, if the most obscene items conceivable were inserted between each of the books of the Bible. But under existing law, the judges and juries are able to identify shams in which non-obscene material is used as a vehicle to insulate obscene material. As established in *Ginzburg*, the "taken as a whole" test is not quantitative. Under *Miller*, even one obscene item contained in a work would be sufficient to support a finding that the entire publication is obscene if, "taken as a whole," the publication lacks serious value.[5] The "taken as a whole" test is not inconsistent with the recognition of shams.

This court has impliedly reached a similar position in two decisions involving the same defendant. *United States v. Thevis*, 484 F.2d 1149 (5 Cir. 1973), *cert. denied*, 418 U.S. 932, 94 S.Ct. 3222, 41 L.Ed.2d 1170 (1974) (*Thevis I*); *United States v. Thevis*, 526 F.2d

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[4] The one case cited by appellant that does not involve a sham was *Belleville v. Morgan*, 60 Ill.App.3d 434, 17 Ill.Dec. 558, 376 N.E.2d 704 (1978). While we are certainly not governed by an Illinois appellate court, this decision deserves consideration because the court correctly applied the "taken as a whole" test to magazines similar to those involved in this case and found most of them obscene under the *Miller* test. While the February 1976 issue of "Playboy" was found not obscene, issues of "Playgirl," "Viva," "Genesis," and "Gallery" were declared obscene. The obscene magazines possess a format and contents similar to "Penthouse" and "Oui."

[5] This of course assumes that the first and second prongs of the *Miller* test are also met.

989 (5 Cir.), *cert. denied,* 429 U.S. 928, 97 S.Ct. 335, 50 L.Ed.2d 299 (1976) (*Thevis II*). In *Thevis I* this court reviewed a conviction of Mike Thevis for violating the federal obscenity statute. The material involved included twelve different magazines which were distributed before the *Miller* decision but after *Memoirs.* This court ruled that the magazines were to be tested under both the *Miller* "serious value" test and the *Memoirs* "without redeeming value" test with Thevis receiving the benefit of the more lenient test. While all twelve magazines were obscene when the *Miller* test was applied, only six of the magazines were obscene under *Memoirs.* The reversal with respect to the six magazines was based upon the literary merit of several articles in each magazine. This court stated that:

> We have distinguished these six from the remainder on the basis of their significant content of literary matter, including short stories of at least arguable merit as well as discussions of lesbianism, homosexuality, nudity, censorship, photography, marital sexual problems, and the nude in fine art. The inclusion of this literary matter in significant proportions precludes a finding, in our judgment, that the six magazines are "utterly without redeeming social value." The issue as to these six is close, due to the numerous pornographic pictures included with the literary matter. Indeed, the pictures in each instance are the principle content of the magazines and would, standing alone, be found obscene.

Essentially the same situation arose in *Thevis II* where this court found all of the materials obscene except one magazine, "Lezo," because it contained "a serious discussion of female homosexuality." The inclusion of the literary matter in significant portions precluded any determination that the magazine did not meet the *Memoirs* test.

The importance of the decisions in *Thevis I* and *Thevis II* revolves around the finding that while various parts of the magazines were admittedly obscene and these obscene parts were not related to the non-obscene parts, the magazines were still not obscene when considered as a whole. *Thevis I* and *Thevis II* demonstrate this court's rejection of the "isolated excerpt" approach supported by the appellant. In both cases, this court considered the magazines as a whole and found that some of the magazines were not obscene because they contained some matter warranting protection, even though they also included admittedly unrelated and obscene material. Like many other courts, this court does not support the piecemeal approach advocated by appellant. *See Right to Read Defense Comm. v. School Comm. of the City of Chelsea,* 454 F.Supp. 703 (D. Mass.1978); *Louisiana News Co. v. Dayries,* 187 F. Supp. 241 (E.D.La.1960); *Pierce v. State,* 145 Ga.App. 680, 244 S.E.2d 589 (1978), *cert. denied,* 439 U.S. 1088, 99 S.Ct. 869, 59 L.Ed.2d 55 (1979); *Hess v. State,* 145 Ga.App. 685, 244 S.E.2d 587 (1978); *Simpson v. State,* 144 Ga.App. 657, 242 S.E.2d 265, *appeal dismissed,* 439 U.S. 887, 99 S.Ct. 241, 59 L.Ed.2d 233 (1978); *see also Leech v. American Booksellers Assoc., Inc.,* 582 S.W.2d 738 (Tenn.1979).

In his supplemental post-argument brief, appellant apparently submits that even though a magazine *may be* treated as a "work, taken as a whole" in some situations, this is a determination that must be made on a case-by-case basis. If this is a correct statement of the law, appellant contends that we are not governed by our previous decisions in *Thevis I* and *Thevis II*. Appellant attempts to support his position with an analysis of several cases involving newspapers. Appellant's authority is weak, at best.

In *Kois v. Wisconsin*, 408 U.S. 229, 92 S.Ct. 2245, 33 L.Ed.2d 312 (1972), the Supreme Court, in a per curiam opinion, determined that two pictures, showing a nude man and nude woman embracing in a sitting position, accompanied by an article and a poem entitled "Sex Poem," comprising an account of the author's recollection of sexual intercourse, that were published in an underground newspaper were not obscene. Appellant attaches special consideration to the fact that the Supreme Court did not allude to any requirement that the entire newspaper had to be "taken as a whole." The Supreme Court's opinion in *Kois* provides no authority for appellant's claim. The Supreme Court, in an effort to reach its decision on the narrowest ground, merely determined that the poem and the pictures accompanied by the article were not obscene. Therefore, it was unncessary to determine whether the arguably obscene items were not obscene when the newspaper was taken as a whole.

Appellant next examines *United States v. Head*, 317 F.Supp. 1138 (E.D.La.1970), again involving an underground newspaper that contained a picture of a nude male masturbating in front of a wall covered with nude female pinups. The court refused to merely observe the picture, by itself, and found that the newspaper, taken as a whole, was not obscene. The court stated that:

> Although several other items besides the picture in question advert to sexual matters, and Anglo-Saxon and colloquial words are used to refer to human organs, bodily functions and sexual relations, the sixteen-page newspaper is devoted predominantly to libidinally neutral news reports, poetry, artwork and discussions of topics generally of interest to the particular community that the newspaper seeks to serve. Contrary to the government's assertions, it is remarkably uniform in its approach to its general subject—the assumed foibles of the way of life generally accepted in this country today. Because it is a newspaper it is comprised of discrete articles, but it is more thematically integrated than most magazines or newspapers of general circulation and, in this regard, it adopts a single point of view of life, much like a novel or a film.

317 F.Supp. at 1144. Appellant attempts to contrast the decision in *Head* with a state court decision in *Scherr v. Municipal Court*, 15 Cal.App.3d 930, 93 Cal. Rptr. 556 (1971). In *Scherr*, the court in essence found it impossible to take a particular issue of an underground newspaper as a whole in its entirety. Appellant interprets the alleged conflict between *Head* and *Scherr* as a statement that the proper rule is that a court's determination that a particular publication must be taken as a whole is limited to the publication before the court and possesses no precedential value. We cannot accept appellant's contention.

First, appellant's authority deals only with newspapers. It is possible that any value attributable to *Kois*, *Head*, and *Scherr* is limited to newspapers. While a magazine usually is not as thematically integrated as a book or a movie, it certainly is more so than a newspaper.

Second, appellant reads too much into the *Scherr* decision. The holding of the California court was merely that a municipal court would not exceed its jurisdiction if it proceeded with the case. The court merely refused to give the defendant a petition for prohibition which would have stopped the municipal court proceeding. While the court stated in dicta that a different rule might be applicable to newspapers and found no authority for the proposition that a newspaper containing obscene material *must* be held non-obscene because it also contained matters of social importance, it did not reach the obscenity issue. The court merely preferred to wait for the result in the trial court after full use of trial and pre-trial procedures before it made an independent review of the obscenity of the newspaper in question.

Third, the January 1978 issues of "Playboy," "Penthouse," and "Oui" are similar to the newspaper in *Head* in that they are "more thematically integrated than most magazines or newspapers of general circulation." 317 F.Supp. at 1144. Even if appellant's case-by-case analysis is a correct statement of the law, the magazines in question resemble the newspaper examined in *Head* more than the *Scherr* newspaper. While the parts of a magazine may not be interrelated in the same manner as a particular episode in a novel to the balance of the book, it is the interrelation between the various features or articles of a magazine and the magazine's basic editorial philosophy or purpose that is significant. The editorial policy acts as a boundary within which each item detailed in the magazine must be

found. Each feature and article must be consistent with that policy. *See Pinkus v. United States*, 436 U.S. 293, 98 S.Ct. 1808, 56 L.Ed.2d 293 (1978).

"Playboy" has been published for over twenty-five years and has been governed by the same editorial policy, "Entertainment for Men." Its principal audience is the urban male between the ages of 25 and 35. The features of the January 1978 issue of "Playboy" are consistent with the editorial philosophy. Included are two short stories dealing with sport themes, a panel discussion on unidentified flying objects, an interview with philosopher Jean-Paul Sartre, an interview with Alex Haley, a series of articles about movie making, reviews of records, books, and movies, an advice column, features on menswear, grooming, food and drink, gift selections, and several features and pictorials dealing with sex or beautiful women.

"Oui" has been published since 1972 and has an editorial philosophy similar to that of "Playboy." The only significant difference between the two magazines is that the target audience of "Oui" is slightly younger adults. The January 1978 issue of "Oui" includes an article concerning obscenity and the First Amendment, an interview with Jacqueline Bisset, a piece about television shows that remain popular long after their demise, a spoof on revolutionary tactics, several short stories, reviews of movies and music, and several features and pictorials dealing with sex and nude women. Again, these items are consistent with the overall editorial policy of "Oui."

"Penthouse" has been published in the United States since 1969 and has an annual worldwide circulation of

60,000,000 copies per year. The editorial policy of the publishers of "Penthouse" is similar to the policy of "Playboy." This editorial policy has resulted in many journalistic awards for the magazine and its editor. Consistent with its editorial policy, the January 1978 issue of "Penthouse" contained an article about Foreign Affairs Advisor Brzezenski, an article entitled "Africa, Jimmy Carter's Vietnam," reviews of books, movies, music, theatre, films, and television, men's grooming aids, several short stories (fiction and nonfiction), as well as stories dealing with sex-related subjects and photographs of nude women including a detachable color photograph measuring 21 inches by 32 inches entitled "Pet Poster" that was included in the magazine.

We conclude that even if appellant's case-by-case analysis is a correct statement of the law, the January 1978 issues of "Playboy," "Penthouse," and "Oui" resemble the underground newspaper found in *Head* more than the newspaper found in *Scherr*. Therefore, the entire magazine constitutes a work that must be "taken as a whole" when determining whether the magazines possess serious value.

[10] In making our independent review to determine whether the materials in question are constitutionally protected, we have examined the January 1978 issues of "Playboy," "Penthouse," and "Oui" and have found that, taken as a whole, "Penthouse" and "Oui" lack serious literary, artistic, political or scientific value. Each of the magazines contains articles possessing serious value as was indicated by Judge Freeman when he described the contents of each magazine as follows:

> For instance, the January issue of "Playboy" contained *inter alia*: (1) an interview with Jean-Paul Sartre; (2) "The Eleventh Hour Santa," a piece on last minute Christmas shopping ideas; (3) "Alex Haley's Candid Conversations," a reprint of the former Playboy interviewer's conversations with public figures such as Miles Davis, Cassius Clay, Malcolm X, Martin Luther King, Jr., and George Lincoln Rockwell; (4) a four article series concerning "Movie Making, Seventies Style" and (5) "Doctor Fast," a fiction piece by Erich Segal.
>
> Likewise, the January, 1978 issue of Penthouse contained *inter alia*: (1) "Cartergate III" an article about the power and policies of United States Foreign affairs adviser Zbigniew Brzezinski; (2) "Africa, Jimmy Carter's Vietnam" by noted author Tad Szulc; (3) "The Vietnam Veteran's Advisor"; (4) "Improving Perfection"; a review of the 1978 Volvo 262C; and (5) "Why Carter Has To Give Away The Panama Canal In Order To Sell Out Taiwan" by Nicholas Von Hoffman.
>
> Finally, the January, 1978 issue of "Oui" contains *inter alia*: (1) "Taking on the Censors," an article concerning obscenity and the First Amendment; (2) an interview with Jacqueline Bisset; (3) "The Fright Report" in which author Stephen King comments upon his works; (4) "Cult T.V.," a piece about television shows that have remained popular long after their demise, and (5) "Hey Kids, Lets Rent The Old Barn And Plan An Invasion of Haiti," a spoof on revolutionary tactics and notions.

In *Jenkins* the Supreme Court examined other factors indicating that the film "Carnal Knowledge" had serious value such as the existence of several favorable reviews and the fact that the film was on the "Ten Best" list for 1971. An examination of similar factors applicable to the magazines in question indicate serious value. "Penthouse" and its editor have received awards from the Columbia University School of Journalism, The Overseas Press Club, and Brandeis University. All three magazines also attract advertising by national concerns. "Penthouse" has an annual worldwide circulation of sixty million magazines. The monthly circulation of "Playboy" is slightly less than five million copies and that of "Oui" is about one million copies. "Playboy" has been published since 1953 and its subscribers include approximately 950 libraries in the United States. Each of these factors provide additional support for the contention that any of the three magazines in question possess serious value.

Each magazine contains items which, standing alone, would be found obscene. Only "Playboy," taken as a whole, appears to possess serious value. The problem with "Penthouse" and "Oui" that distinguishes them from "Playboy" is that the latter magazine possesses a significant content of literary matter including short stories, interviews, and panel discussions of great merit. The inclusion of this literary matter in significant proportions precludes a finding that "Playboy" taken as a whole lacks serious literary, artistic, political or scientific value. The issue with respect to "Penthouse" and "Oui" is close but the numerous pictorials and obscene letters were not saved by the articles possessing some literary merit. *See* Table I, *infra.*

In "Penthouse," the pictorial materials included not only the "Pet Poster" and the section entitled "Tender Loving Carrie," described earlier, but also a pictorial presentation entitled "Tropic of Capricorn." In this set of pictures, a woman is pictured in naked and semi-nude poses which expose either her breasts or her genitals or both, accompanied by text material in which she extolls the pleasures of sexual fantasies and experimentation. Many of the accompanying photographs show her with legs outstretched and genitals bared, while she manipulates her breasts or her genitals. The pictorial presentation entitled "Tender Loving Carrie," in addition to the pictures described above, also includes a two-page color centerfold photograph in which the woman is pictured, legs apart, baring the outer and inner lips of her genitals and her anus. Similar photographs appear in the pictorial presentation entitled "Belle D'Azur" and in the "Pet Poster." Also included are patently offensive descriptions of sexual conduct, described above, in the form of letters from readers and articles as well as sexually suggestive cartoons and off-color cartoon material labeled as satire. Taken as a whole, "Penthouse" appears to lack serious value.

The same can be said about "Oui." It also includes patently offensive descriptions of sexual conduct in the items entitled "Sex Tapes" and "Sex Tape Letters," as described above, as well as sexually suggestive and off-color cartoons. The pictorial presentations entitled "Maria" and "Eve" included pictures of a woman in nude or semi-nude poses which exposed either their breasts or genitals or both. The pictorial presentation entitled "Two Girls in Paris" pictured two nude women in a manner suggesting or simulating homosexual conduct. Even when these items are viewed in conjunction with the articles possessing some literary merit, taken as a whole, "Oui" does not possess serious value.

In summary, because the *Miller* test is conjunctive, the district court correctly determined that "Playboy" is not obscene but erred with respect to its decision as to "Penthouse" and "Oui." Our conclusions are summarized in the following table:

TABLE I

Magazine Titles	(a) The average person, applying contemporary community standards, would find that the work taken as a whole appeals to the prurient interest	(b) Patently offensive depiction or description of sexual conduct specifically defined by applicable statute	(c) Taken as a whole, lacks serious literary, artistic, political or scientific value
1. Playboy	No	No	No
2. Penthouse	Yes	Yes	Yes
3. Oui	Yes	Yes	Yes

AFFIRMED in part; REVERSED in part.

CHARLES CLARK, Circuit Judge, concurring:

I concur in the result of Judge Thornberry's opinion and in almost everything he writes. Respectfully, I cannot agree with Judge Thornberry's conclusion that the only act of "sexual conduct" as defined by Georgia law arguably depicted in the January issue of *Oui* and *Penthouse* was lewd exhibition of the genitals. In the pictorial entitled "Two Girls in Paris" in *Oui*, two naked females are depicted in a bathroom and bedroom in various positions which the text makes plain are of lesbian embrace and foreplay. In two of its naked-female pictorial sections, *Penthouse* includes pictures of women practicing or simulating masturbation. With the camera aimed at the genitals, each is posed eyes closed, mouth open, fingering her clitoris. The accompanying text contains passages which reinforce the masturbatory imagery.

In addition to text materials which Judge Thornberry adjudges obscene, I find extensive pictorial and verbal portions of *Oui* and *Penthouse* which violate Georgia law in a patently offensive way. Because of these additional materials, I completely agree with Judge Thornberry's application of *Miller's* second prong in respect to these publications.

Although I am in full agreement with Judge Thornberry's analysis of existing precedent relating to application of the "taken as a whole" test to magazines, I write further only to observe that this rule of law in its present state of development creates needless uncertainty for everyone involved.

In its first two tests, *Miller* (i) adopts a community's standard of prurience and (ii) permits the community to codify specific bans on sexual conduct. An overbroad interpretation of whether, "taken as a whole," a publication as loosely structured as these magazines lacks serious literary, artistic, political or scientific value could deny all meaning to those standards of morality and decency. How then is this third test to be applied? Should it weigh the good against the bad, *i. e.*, does one brilliant article on the arts outweigh explicit pictures of a couple copulating, or does one series of pictures portraying the rape and mutilation of a child outweigh two average articles on politics or science? When the materials are totally independent of every other portion of the publication except through a claimed appeal to some interest of the magazine's expected audience, I submit that segment ought to be separately appraised. If it is totally independent, it ought not be carried, Typhoid Mary-like, into a community by other articles which show serious merit. Ipse dixit judicial pronouncements on the value of an individual magazine "as a whole" are no more helpful than the "I know it when I see it" approach. Until the court permits separate appraisal of each discrete segment of the hodgepodge, publishers, community, policeman, and judge will have to continue to wonder what the drum says.

I don't like to find myself in disagreement with Judge Kravitch and Judge Freeman, who live in Atlanta, about the contemporary community standards of Fulton County, Georgia, but as Judge Thornberry so aptly puts it, my appellate judicial responsibility in this regard is to be exercised independently of theirs. I do not pretend to know every citizen, community, or family value that comprise that bustling, cosmopolitan metropolis, but I know enough of them to make a sure, true judgment that the average person in Atlanta applying contemporary community standards would find the January issues of both *Penthouse* and *Oui*, taken as a whole, to appeal to the prurient interest and to lack serious literary, artistic, political, or scientific value.

KRAVITCH, Circuit Judge, concurring in part and dissenting in part:

I join the majority in the decision that (1) appellant's conduct constituted an illegal prior restraint, (2) *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), requires an evaluation of a magazine "as a whole" rather than as separate component parts and (3) the publication "Playboy" is not obscene.

I disagree with the majority that the January 1978 issues of "Penthouse" and "Oui" are obscene under the *Miller* criteria.

The very able discussion in the majority opinion of the laws pertaining to obscenity in relation to the First Amendment and especially of the application of *Miller v. California* to publications obviates the necessity of repetition. As the majority pointed out, all three elements of the three-prong *Miller* test [1] must be satisfied before a publication "as a whole" can be adjudicated obscene and not entitled to the protection of the First Amendment. I agree with this analysis of the law; I disagree with its application to the publications "Penthouse" and "Oui."

The Supreme Court, in adopting the first prong of *Miller*, obviously understood that community standards vary and therefore intended that the applicable standards be determined by the fact finder, jury or judge as the case might be, of the particular community involved. Here, the district judge, drawing upon his personal knowledge as a resident of Fulton County, Georgia, as well as the testimony of experts introduced at the trial, found that, applying contemporary community standards of Fulton County, "Penthouse" and

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[1] As provided by the Supreme Court in *Miller, supra,* the test is:

> (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest . . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

413 U.S. at 24, 93 S.Ct. at 2615.

"Oui" taken "as a whole" did not appeal to a prurient,[2] i. e. "shameful or morbid," interest in sex. The majority rejected this finding and further determined that both magazines contained patently offensive depictions and descriptions of proscribed conduct and as a whole lacked serious literary, artistic, political or scientific value, thus satisfying all three prongs of the *Miller* test.

I do not argue with the majority's conclusion that *certain* of the articles and photographs in both magazines [3] are not only vulgar, crude and beyond the limits of acceptable taste, but also appeal to a prurient interest, are patently offensive depictions of proscribed conduct and lack serious literary and artistic value. An evaluation of *certain* items is not the test, however. The magazines must be judged "as a whole" rather than by specific discrete segments.

Admittedly, the "as a whole" test cannot begin and end with a page count. The quantity of the objectionable material is, however, one aspect which must be considered when determining whether the first prong has been satisfied. The quality or degree of offensiveness is also relevant. A careful analysis of both of these magazines including the total number of pages containing objectionable material as contrasted with nonobjectionable,[4] the degree of offensiveness,[5] together with Judge Freeman's fact-finding compels a conclusion that "Penthouse" and "Oui" do not meet prong (a) of the *Miller* test.

The third prong of *Miller* also requires evaluating

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[2] It should be noted that the court must determine what constitutes a normal interest in sex, i. e. non-prurient, and distinguish material which appeals to that interest from material which appeals to a shameful or morbid, i. e. prurient, interest in sex.

[3] In "Penthouse": for example, certain letters in "Penthouse Forum" and several photographs in the "Pet Poster", "Tender Loving Carrie" and "Tropic of Capricorn" series. In "Oui": portions of "Sex Tapes", "Sex Tape Letters" and several photographs in the series "Two Girls in Paris".

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[4]

Penthouse

	No. of Pages
Total Pages	219
Advertisements (generally of nationally advertised non-sex related products)	55
Articles	
Sexual	10(0)*
Nonsexual	27
Fiction	12
Short Features (mixed sexual and nonsexual)	8
Consumer News	13
Photo Layouts	49(6)*
Cartoons	19
Letters to the Editor, Table of Contents, etc.	
Sexual	18(18)*
Nonsexual	8

Oui

	No. of Pages
Total Pages	139
Advertisements (generally of nationally known non-sex related products)	20
Articles	
Sexual	7(3)*
Nonsexual	39
Fiction	0
Short Features (mixed sexual and nonsexual)	14
Consumer News	2
Photo Layouts	31(3)*
Cartoons	15
Letters to the Editor, Table of Contents, etc.	
Sexual	3(3)*
Nonsexual	8

*The numbers in parentheses denote those pages of sexual items that may be said to contain patently offensive material judged by the prevailing community standards in Fulton County because of style of depiction involved (lewdness of pose, focus of the camera, language, etc.). Although there is no necessary congruence between degree of offensiveness of the material and whether the material appeals to a prurient interest, for purposes of analysis under part (a) of the *Miller* test, those patently offensive pages have been considered to *arguably* appeal to the prurient interest. Note that if one picture out of many on a given page is considered to appeal to a prurient interest, the entire page has been counted in the parenthetical number.

[5] Except for "Two Girls in Paris", the depictions are solitary

the magazines "as a whole": weighing those portions which possess serious literary, artistic, political or scientific value against those which do not. "Penthouse" encompasses a wide spectrum of subjects: politics, science, consumer information, fiction, as well as sex. Some articles by nationally recognized authors are of excellent quality; others are of mediocre or questionable quality and certain segments would be classified obscene.[6] Applying the third prong of *Miller*, quantita-

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figures and none of the articles or pictures are lurid, graphic or objectionable to the extent of tainting the publications "as a whole."

[6]

Penthouse

Contents		
Cover		Photo by Stan Malinowski
Housecall	Introduction	
Forum	Correspondence	
Feedback	Opinion	
Call Me Madam	Counsel	Xaviera Hollander
View From The Top	Comment	Robert S. Wieder
Scenes		Marilyn Stasio
Films		Roger Greenspun
Words		Robert Stephen Spitz
Sounds		Vernon Gibbs
Cartergate III: The Thoughts of Chairman Brzezinski	Article	Craig S. Karpel
Tropic of Capricorn	Pictorial	Photos by Earl Miller
Africa: Jimmy Carter's Vietnam	Article	Tad Szulc
Pretty Baby	Profile	Robert Stephen Spitz
The Mime	Fiction	Joyce Carol Oates
Anita Bryant	Interview	Sandra Shevey
Separate (Components) But Equal	Service	Harold Rodgers
Tender Loving Carrie	Pet of the Month	Photos by Stan Malinowski
Vietnam Veterans Adviser	Service	
Why Carter Has To Give Away The Panama Canal In Order To Sell Out Taiwan	Essay	Nicholas von Hoffman
Happy Hookers	Humor	Walter Gallup
Dressed To Kill	Fashion	Ed Emmerling
The Skins Of Peggy	Humor	Nick Tosches
Belle D'Azur	Pictorial	Photos by Otto Weisser
Couples: The Sex Fantasists	Survey	
Volvo: Improving On Perfection	Service	Joe Kelleher
Many Happy Returns	Service	
Oh, Wicked Wanda!	Satire	Frederic Mullally/ Ron Embleton

tively and qualitatively balancing the contents, I conclude that "as a whole" "Penthouse" does not lack serious literary, political, scientific or artistic value.

I cannot say the same for "Oui". Although "Oui" contains some diversity of subject matter and several articles of average quality,[7] again balancing the contents both quantitatively and qualitatively, considering the range and calibre, the reputation of authors and the method of presentation, I do not find that the magazine "as a whole" possesses *serious* literary, artistic, political or scientific value.

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[7]

Oui

Contents		
Mail (Delighted readers respond.)		
Openers (Arab dating guide, plus other stuff.)		
Sex Tapes (Sex among the politically powerful.)		
Revue (Mano picks the worst.)	Criticism	
Maria (Her brother was right. She's a good girl.)	Pictorial	
Taking On The Censors (The *Miller* decision and its victims.)	Article	Robert Sabbag
Nose Job (On picking out the perfect proboscis.)	Article	Donald Bowie
The History Of Schoolgirls In American Movies (Teen meat in the mass market.)	Article	Mitch Tuchman
The Little Man In The Boat (Once and for all, how to make a woman come. And come again.)	Article	Lisa Southern
Eve (She wants to take a bite out of the fruit of the luminary.)	Pictorial	
Conversation With Jacqueline Bisset (The screen's smartest cupcake talks about life in and out of her wet T-shirt.)	Interview	
Compact Hi-Fi (Six little stereo sets that will squeeze into tight places.)	Consumer News	

Accordingly, because neither publication, "Penthouse" nor "Oui", satisfies all three criteria, I conclude that they are not obscene under *Miller*.[8] Although these magazines are personally distasteful, my reading preferences are not at issue. What is at issue is freedom of expression under the First Amendment.

I would affirm the district court's decision. I therefore concur in part and dissent in part.

Oui

Contents		
The Fright Report (The author of *Carrie* tells what it's like to scare people shitless.)	Article	Stephen King
Cult TV (Fifteen shows of yesteryear. They don't make television like this anymore, and they probably never did.)	Article	
The Girls of Madame Claude (Inside Paris' luxury cathouse.)	Pictorial	
Hey, Kids, Let's Rent The Old Barn And Plan An Invasion Of Haiti (Battle plan)	Humor	Jim Hougan
Two Girls In Paris (Air France lost their luggage so they go around bare-ass.)	Pictorial	

Although the "Penthouse" table of contents is precisely reproduced in footnote 6, such precision of reproduction is not possible with "Oui" because "Oui's" table of contents includes pictures which cannot be reproduced here. The editorial descriptions of the articles in the "Oui" table of contents is copied from the original.

[8] Thus using the table adopted by the majority:

Magazine Titles	(a) The average person, applying contemporary community standards, would find that the work taken as a whole appeals to the prurient interest	(b) Patently offensive depiction or description of sexual conduct specifically defined by applicable statute	(c) Taken as a whole, lacks serious literary, artistic, political or scientific value
1. Playboy	No	No	No
2. Penthouse	No	Yes	No
3. Oui	No	Yes	Yes

APPENDIX E

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 77-2951

D. C. Docket Nos. CA-77-1238A, CA-77-1240A,
CA-77-1268A, CA-77-1276A,
& CA-77-1277A
(consolidated in D.C.)

PENTHOUSE INTERNATIONAL, LTD.,
Plaintiff-Appellee,
v.
HINSON McAULIFFE, etc.,
Defendant-Appellant.

HUSTLER MAGAZINE, INC., etc.,
Plaintiff-Appellee,
v.
HINSON McAULIFFE, etc.,
Defendant-Appellant.

HIGH SOCIETY MAGAZINE, INC.,
Plaintiff-Appellee,
v.
HINSON McAULIFFE, etc.,
Defendant-Appellant.

EASTWAY ENTERPRISES, LTD.,
Plaintiff-Appellee,
v.
HINSON McAULIFFE, etc.,
Defendant-Appellant.

MONTCALM PUBLISHING CORPORATION,
Plaintiff-Appellee,
v.
HINSON McAULIFFE, etc.,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Georgia

Before THORNBERRY, CHARLES CLARK and KRAVITCH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part;

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

FEBRUARY 6, 1980

CHARLES CLARK, Circuit Judge, concurring:

KRAVITCH, Circuit Judge, concurring in part and dissenting in part:

A true copy

Test: GILBERT F. GANUCHEAU

Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ MARY BETH BREAUX

Deputy

New Orleans, Louisiana

FEB 28, 1980

ISSUED AS MANDATE: FEB 28, 1980

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 78-2794

D. C. Docket Nos. C77–1974A, C77–1998A &
C77–1999A (cons. in D.C.)

PENTHOUSE INTERNATIONAL, LTD.,
Plaintiff-Appellee,

v.

HINSON McAULIFFE, Individually and as Solicitor General of the County of Fulton, State of Georgia,
Defendant-Appellant.

PLAYBOY ENTERPRISES, INC.,
Plaintiff-Appellee,

v.

HINSON McAULIFFE, Individually and as Solicitor General for the County of Fulton, State of Georgia,
Defendant-Appellant.

PLAYBOY PUBLICATIONS, INC.,
Plaintiff-Appellee,

v.

HINSON McAULIFFE, Individually and as Solicitor General for the County of Fulton, State of Georgia,
Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Georgia

Before THORNBERRY, CHARLES CLARK and KRAVITCH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in part and reversed in part.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiff-appellee, Playboy Enterprises, Inc., the costs on appeal to be taxed by the Clerk of this Court.

IT IS FURTHER ORDERED that plaintiffs-appellees, Penthouse International, Ltd., and Playboy Publications, Inc., pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

FEBRUARY 6, 1980

CHARLES CLARK, Circuit Judge, concurring:

KRAVITCH, Circuit Judge, concurring in part and dissenting in part:

A true copy

Test: GILBERT F. GANUCHEAU

Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ MARY BETH BREAUX

Deputy

New Orleans, Louisiana

FEB 28, 1980

ISSUED AS MANDATE: FEB 28, 1980